

FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION



NOVEMBER 1981
Volume 3
No. 11

DECISIONS

November 1981

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Commission Decisions

NOVEMBER

The following cases were Directed for Review during the month of November:

Secretary of Labor on behalf of S. Smith, T. Smith and P. Anderson v. Stafford Construction Company, WEST 80-155-DM, etc. (Judge Morris, September 24, 1981).

Howard Mullins and UMWA v. Pocahontas Fuel Company, HOPE 75-680, IBMA 75-39, IBMA 75-40 (Judge Moore, October 5, 1981).

Secretary of Labor on behalf of Milton Bailey v. Arkansas-Carbona Company, and Michael W. Walker, CENT 81-13-D (Judge Laurenson, October 7, 1981).

Secretary of Labor v. Cleveland Cliffs Iron Company, LAKE 80-129-M (Judge Cook, October 8, 1981).

Secretary of Labor v. Eastover Mining Company, KENT 80-141 (Judge Fauver, Petition for Interlocutory Review of November 3, 1981 Order).

Secretary of Labor on behalf of Clarence Ball v. B & B Mining Company, Inc., Laurel Mountain Mining Company, Robert Esseks, Joda Blankenship, VA 80-128-D (Judge Laurenson, October 19, 1981)

Maben Energy Corporation v. Secretary of Labor, MSHA, WEVA 79-447-R, etc. (Judge Melick, October 21, 1981).

Secretary of Labor, MSHA on behalf of Bruce Edward Pratt v. River Hurricane Coal Company, Inc., KENT 81-88-D (Judge Kennedy, October 19, 1981).

Review was Denied in the following cases during the month of November:

Secretary of Labor, MSHA v. Brown Brothers Sand Company, SE 81-24-M (Judge Koutras, September 28, 1981).

Secretary of Labor, MSHA v. Beckley Coal Mining Company, WEVA 79-465-R, etc. (Judge Fauver, September 30, 1981).

Secretary of Labor, MSHA v. Southern Ohio Coal Company, LAKE 80-142 (Judge Lasher, October 13, 1981).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 3, 1981

MINING ENFORCEMENT AND	:	
SAFETY ADMINISTRATION	:	
(MESA),	:	
Petitioner	:	Docket No. DENV 75-163-P
	:	
v.	:	IBMA 77-3
	:	
KAISER STEEL CORPORATION,	:	
Respondent	:	

DECISION

This appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for disposition. Section 301, Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 961.

Kaiser Steel Corporation (Kaiser) has appealed from a decision assessing a civil penalty of \$6,000.00 against it for a violation of 30 CFR § 75.509.¹/ We have reviewed the record, briefs, and the proceedings below, and affirm the judge's decision. The contentions advanced on this appeal were presented below, and in our view properly disposed of by the judge.

This case was initiated under the Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801 et seq. (1976) (amended 1977) [the 1969 Act]) following the death of miner Gary J. Nichols, fatally injured on February 27, 1973 while changing shearing wheel bits on the shearing machine in Kaiser's Sunnyside No. 1 Mine. When the shearing machine unexpectedly started up, the victim was crushed under the shearing wheel before the power could be shut off and the wheel stopped.

On appeal Kaiser directs us to three main issues, the first of which is whether this regulation can be properly applied to a bit changing operation.

¹/Section 75.509 provides: All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment except when necessary for trouble shooting or testing.

Kaiser maintains that 75.509, a statutory standard, 2/ is solely designed to prevent electrical hazards to miners working on electrically powered equipment, but was not intended to regulate mechanical maintenance such as bit changing. It notes that 30 CFR 75.510 and 75.511 are also taken verbatim from section 305(f) of the 1969 Act,3/ and that this series of statutorily derived regulations are directed toward the performance of electrical work, not the mechanical procedure of bit changing. We agree with the analysis of the judge below, however, and find that these regulations are not so restricted.

2/Section 305(f) provides: All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing. In addition, energized trolley wires may be repaired only by a person trained to perform electrical work and to maintain electrical equipment and the operator of such mine shall require that such person wear approved and tested insulated shoes and wireman's gloves. No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who performed such work, except that, in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

3/30 CFR 75.510 and 30 CFR 75.511 provide:

30 CFR 75.510 - Energized trolley wires may be repaired only by a person trained to perform electrical work and to maintain electrical equipment and the operator of a mine shall require that such person wear approved and tested insulated shoes and wireman's gloves.

30 CFR 75.511 - No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that, in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them, or, if such persons are unavailable, by persons authorized by the operator or his agent.

Kaiser points to the adoption four days before this accident of a new regulation (30 CFR 75.1725) which better covers the function of bit changing.^{4/} In August 1973, six months after this fatal accident, Petitioner's Manual ^{5/} was changed to reflect adoption of this new regulation, and that bit changing was now under 75.1725, not 75.509. Accordingly, Kaiser avers that the only connection between 75.509 and bit changing is a result of the strained interpretation in MESA's (September 1972) Safety Inspection Manual.^{6/}

However, the relevant Manual language under both 75.1725 and 75.509 is identical. Further, Kaiser concedes that "this standard (75.1725) by itself, still does not expressly regulate this procedure." As Kaiser--correctly--notes the Manual is in any event not to be given the force of law, since not promulgated as if it were a regulation under the Act. We have no quarrel with this contention, although the implication that MESA is bound by the Manual, even though the operator is not, is not persuasive, especially since no reliance on the Manual is claimed by the operator. See Kaiser Steel, 3 IBMA 489 (498)(1974). However, neither 30 CFR 75.509 nor 30 CFR 75.1725 make reference to bit changing, and no reason appears from the language of either why one is to be preferred to the other in the regulating of this mining function. See also Bell Coal Coal Company, Inc., 5 IBMA 155 (1975), and the judge's discussion thereof below at pages 7 and 8.

Parsing the language of Section 305 of the Act lends further support to this statutory regulation's applicability in this case. Indeed, Section 305 (which is headed "Electrical - General") regulates (e.g.) "handheld electric drills, blower and exhaust fans, electric pumps, and other low horsepower electric face equipment." This would appear intended to enumerate more inclusively the electric equipment to be regulated by this section of the Act, rather than to restrict its application to only more conventionally 'electrical' equipment, as urged by Kaiser.

4/30 CFR 75.1725(c) and 75.1725(d) provide:

75.1725(c) - Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

75.1725(d) - Machinery shall not be lubricated manually while in motion unless equipped with extended fittings or cups.

5/United States Department of the Interior, Bureau of Mines, Coal Mine Safety Inspection Manual for Underground Mines.

6/The Manual provided: Opening a circuit breaker which is installed on the machine and which opens all power conductors entering the machine shall be accepted as compliance with this section for lubrication or changing bits. [Exhibit P-7].

To hold that this machine, powered by both a 950 volt operating circuit and a 120 volt control circuit, is not electric equipment, would permit maintenance to be performed on this shearing machine--and undoubtedly a great many other electrically powered mining machines--without requiring that these be deenergized, despite all parties' agreement that maintaining power to the machine here involved during bit changing would be unsafe.7/

For, as was noted below:

"As pointed out by MESA, section 75.509 by its terms refers to "electric equipment" as well as "power circuits". It does not unduly strain the regulatory language to classify a shearing machine powered by a 950-volt trailing cable as a piece of electrical equipment."

As the judge, and for similar reasons, we have little, if any, difficulty applying 30 CFR 75.509 to this bit changing operation.

It is also asserted that "shall be deenergized" in 30 C.F.R. 75.509 is ambiguous since the standard fails to define deenergize, and the circumstances under which equipment is to be deenergized. We reject this argument; on this record it is clear that deenergize was understood by the miners, including two of Kaiser's own employee-witnesses. And see the judge's decision, pages 9-12.

Kaiser next contends that even if 30 CFR 75.509 is found to be applicable, a question exists as whether there was sufficient evidence presented to establish a violation of the standard.

The analysis of the judge below in our view simply and correctly summarizes the record. The evidence adduced at the hearing showed that turning off the power disconnect switch on the machine was (at that time) considered sufficient compliance with the standard. However, Kaiser suggests that the accident could have resulted from the operator "jogging" or "goosing" the wheel by turning on the power disconnect switch, rather than the power disconnect switch being on during the (entire) course of the bit changing operation.

7/As to the disagreement as to how deenergization is to be accomplished, more specifically the point at which the power is to be disconnected, see infra, page 5.

The parties agree that there was power going to the shearing machine wheel at the time of the accident, the machine was in gear, and that rotation of that wheel killed miner Nichols while he was engaged in changing bits on the machine. Whether or not one agrees with Kaiser's view of the manner in which or place where this machine is to be deenergized,^{8/} it is indisputable that power was coming to the machine, more precisely to the shearing wheel, at the time the miner was killed. We therefore hold that the judge below correctly found that there was sufficient evidence that the machine was not deenergized within the meaning of the regulation, and that the standard was accordingly violated.

As the judge found:

"The evidence demonstrates (1) that there was an established procedure known to the operator for ensuring that the shearing machine not start up during the bit changing procedure, and (2) that the accident under consideration here would not have occurred unless the procedure was violated."

There is substantial record evidence in support of that finding. Nor was any testimony adduced which indicated that the machine itself was in any way defective; indeed, the post-accident investigation found no defects, either electrical or mechanical.

Finally, we find that the judge's decision was based on reliable, probative and substantial evidence, contrary to the contention of Appellant.

Kaiser has asserted that two out-of-court statements, admitted into evidence at the hearing but thereafter rejected by the judge as a basis for any findings, actually played a key role in leading the judge below to his decision. Scrutiny of that decision reveals no support for this contention.

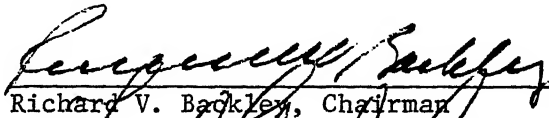
Appellant also raises objection to the Petitioner's accident investigation report prepared by the inspectors who largely conducted the post-accident investigation. It is sufficient to note that this report (Exhibit P-3) was received into evidence without objection by Kaiser, and provides ample support for the decision rendered.

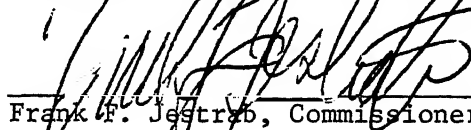
^{8/}If the power had been disconnected externally, by disconnecting the cable at the headgate outside the machine, obviously there would have been no power to either the 120 volt control or 950 volt circuits. However, the nature of the occurrence in this instance make it clear that there was power coming both through the control circuit on the machine--even if arguably in conformity with procedure approved by both MESA and Kaiser--and to the 950 volt circuit (which is activated only by and after the control circuit is energized). Whether this was inadvertent or not, without this power the wheel would not have rotated, and the miner would not have died. Nor, we note parenthetically, was any testimony presented as to why the shearing machine was not moved clear of the mine face, roof or walls before bit changing was begun.

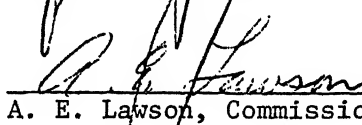
In summary, we find that 30 CFR 75.509 is applicable to these facts, that there was an established procedure, known to the operator, for insuring that the shearing machine not start-up during the bit changing procedure, and that the accident under consideration here could not have occurred unless that procedure was violated. Kaiser's own witnesses testified to the effect that the power was on and the clutch engaged at the time of the accident and death of miner Nichols.

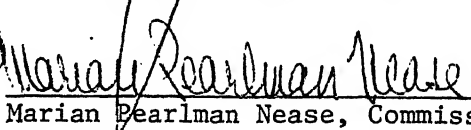
We further find that the judge, having determined that a violation of this mandatory statutory standard occurred, complied with section 109(a) of the Act in analyzing the factors required to be considered in determining the amount which he assessed as a penalty.

The decision of the administrative law judge is affirmed.


Richard V. Backley, Chairman


Frank F. Jestrab, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 4, 1981

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

MISSOURI GRAVEL COMPANY

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:

Docket No. LAKE 80-83-M

DECISION

This civil penalty proceeding arises under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The administrative law judge, in a summary decision, concluded that the "undisputed" facts of record did not establish violations of 30 CFR §56.14-1 as alleged by the Secretary of Labor. 1/ For the reasons set forth below, we find the judge erred.

Five citations, each of which alleged a failure to guard a tail or drive pulley, were issued to Missouri Gravel. After the Secretary filed a penalty proposal for the violations, Missouri Gravel answered, denying that the conditions for which the citations were issued violated the standard. The administrative law judge issued a pretrial order, that among other things, required Missouri Gravel to submit a specific statement as to why it contested each alleged violation. Missouri Gravel responded asserting that the pulleys were in compliance with the standard in that two were guarded by reason of their location, three were guarded by various barriers (e.g., chain, pipe or angle iron), and that access to the pulleys was restricted in varying degrees. Moreover, it argued that no employee would normally be exposed to the pulleys except, in some instances, for maintenance work at which time the pulleys would not be operating.

The judge issued an order reciting Missouri Gravel's defenses and ordering the Secretary to provide a detailed factual statement as to his agreement or disagreement. The Secretary responded with respect to each citation. In general he asserted that the pulleys were not guarded by their location or by the barriers because, in each instance, employees traveled or worked in the vicinity of the pulleys and could be caught and injured in them, although the allegations concerning the details of employee exposure and the likelihood of injury varied with respect to each citation.

1/ 30 C.F.R. §56.14-1 provides:

Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

A document styled "Tentative Decision" was then issued by the judge in which he stated that, based upon "an independent evaluation and de novo review of the parties' prehearing submissions", he found "no genuine dispute as to any of the material facts." He further found that none of the charged violations presented "any reasonably recognizable hazard of injury to any normally prudent employee exercising reasonable care in the performance of assigned duties." He ordered the parties to show cause why the "tentative decision" should not be adopted as a final decision. In response, the Secretary asserted that the cited conditions constituted violations of section 56.14-1 because the equipment was unguarded and miners were exposed to unguarded moving parts. The Secretary further stated that the frequency of the exposure relates to the gravity of the violation for penalty purposes, rather than to the question of whether a violation exists.

On July 8, 1980, the judge issued a final decision "adopting and confirming" his "tentative decision". The judge stated that the Secretary had "failed to contest my tentative finding that there was no genuine dispute as to any of the facts material to the five failure to guard violations." Therefore, he concluded, an evidentiary hearing was not necessary and summary decision should be entered. The judge stated "the undisputed facts show each of the locations cited is so inaccessible, it is highly improbable that in the course of his work duties any normally prudent employee is likely to come into contact with these moving machine parts." He then dismissed the Secretary's proposal for a penalty.

Summary decision is an extraordinary procedure. If used improperly it denies litigants their right to be heard. Under our rules, a party must move for summary decision 2/ and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law. 29 C.F.R. §2700.64(a), (b). The judge found no genuine dispute as to any material fact. We disagree. The standard requires guarding of moving machine parts "which may be contacted by persons, and which may cause injury to persons." As the following recitation of the parties' pretrial submissions makes clear, a genuine dispute as to the potential for contact and injury exists.

Citation No. 362881 alleged the oversized belt conveyor tail pulley was not guarded on its west side. Missouri Gravel asserted the pulley was guarded by its very location in that the pinch point was located at the bottom of the pulley and was accessible only by crawling on hands and knees. It stated that this had to be done only for maintenance purposes at which time the conveyor would not be operating. It asserted no worker was generally stationed in the area and that the pulley was not in a regularly traveled way. The Secretary disagreed with Missouri Gravel's assertion that the pulley was not in a regularly traveled way. Moreover, the Secretary asserted the pulley was not guarded by reason of its location because it had "points with exposed ends which could be reached by persons close to the tail pulley by only moving their feet and touching the points." The Secretary also stated the pulley could "catch the clothes of persons standing close to it." He alleged that the operator of the equipment, with the help of labor personnel, cleaned

2/ Here neither party moved for summary decision. The judge invoked the procedure on his own. While there is some authority in the federal courts that the analogous federal rule of civil procedure permits summary decision without a specific motion, we believe that in our proceedings, except in the most exceptional circumstances, it should not occur. See 6 Moore's Federal Practice §56.12 (2d ed. 1976)(Supp. 1980-81). As this case illustrates, it can all too easily lead to an arbitrary and erroneous decision.

the equipment and "regularly walked and stood sufficiently close to the pinch point to be subject to injuries." The Secretary listed several other functions which caused the operator of the equipment and other labor personnel to stand "regularly close to the pinch point," and he asserted the functions are "usually performed while the equipment is in operation."

Citation No. 362882 alleged that a self cleaning tail pulley on a log washer belt conveyor was not guarded. Missouri Gravel stated the pulley was guarded by its very location in that it was not located on a regular travelway. It asserted the pulley was not in an area where workmen would be stationed during normal operations and that the pulley was several feet above the ground. The Secretary did not agree that the pulley was properly guarded by reason of its very location. He also disagreed it was not on or near a normal travelway. He asserted that the operator of the equipment and labor personnel were required to regularly move under and regularly stand under the pulley to oil it, to put antifreeze on it, to check its alignment and to work under it with shovels. These persons, he asserted, "could be injured by moving their hands or heads close to the pulley."

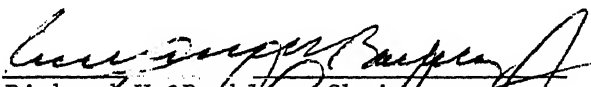
Citation No. 362887 alleged the ballast conveyor drive pulley was not guarded. Missouri Gravel asserted that a chain barrier, which was located approximately 2 feet from the pulley, and a warning sign properly guarded the pulley. It stated that the only time a person would be in the area would be for maintenance purposes and that the conveyor would not then be operating. The Secretary responded that a person could be caught in the pulley by reaching a hand over the chain barrier or by walking under or over the chain. He stated that "[t]he operator of the equipment, labor personnel working with him and maintenance personnel regularly moved or stood close to the pinch point." He asserted these personnel could go sufficiently close to the pulley to be injured for several reasons and that when they did go that close "the conveyor usually was in operation."

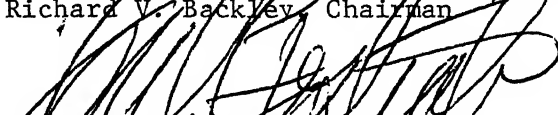
Citation No. 362889 alleged that a dewatering screen drive pulley was not guarded. Missouri Gravel asserted the pulley was "adequately guarded" by a pipe barrier which had to be turned or lifted to reach the pulley area. It also asserted that only maintenance personnel would go into that area for maintenance purposes or to check the oil gauge and at those times the conveyor drive would not be operating. The Secretary asserted the pipe was not a guard because "it could be removed by anybody walking in the area." He also asserted that the operator of the equipment, labor personnel working with the operator and maintenance personnel "were in the area and walked close to the pinch point for several reasons."

Citation No. 367379 alleged the drive pulley for the main incline belt was not guarded and that a start switch for the belt was 1-1/2 feet from the bottom of the pulley. Missouri Gravel asserted the pulley was guarded by an angle iron barrier and that the pinch point of the pulley was 3 feet 9 inches from the barrier. It also asserted the pulley was


"not located in a normal travel way area and that the only reason for access to the area would be for maintenance of the pulley, at which time the conveyor would not be operating." The Secretary asserted the operator of the equipment, labor personnel working with the operator or maintenance personnel "walked or stood close to the pinch point." He also stated that "a person could [be] caught in the pinch point by leaning over the barrier to shut off the power."

In light of the above, we conclude that the record establishes unresolved disputes concerning whether persons may contact these moving machine parts and be injured thereby. We find these disputes to be material. In entering summary decision for Missouri Gravel, the judge was trying issues of fact through the summary decision procedure. This he cannot do. Accordingly, summary decision was improperly entered. 3/ We reverse and remand for further proceedings consistent with this opinion.


Richard V. Backley, Chairman


Frank F. Jestrab, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

3/ In view of our determination that the judge erred in finding there were no material facts in dispute, at this time we do not reach the issue of whether, as a matter of law, the judge properly interpreted and applied the standard.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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November 5, 1981

VICTOR McCOY,	:	
	:	
Complainant	:	
	:	
v.	:	Docket No. PIKE 77-71
	:	
CRESCENT COAL COMPANY,	:	
	:	
Respondent	:	
	:	

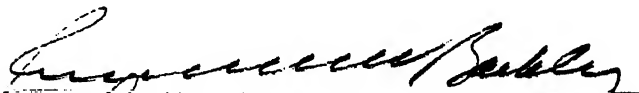
ORDER

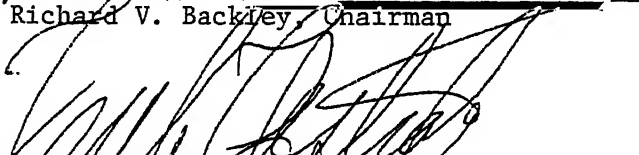
On May 10, 1977, Victor McCoy filed a complaint of discrimination against Crescent Coal Company under section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et. seq., (1976 and Supp. I 1977) alleging he was discharged by Crescent on April 22, 1977 for refusing to ride an unsafe belt line into Crescent's mine. On September 28, 1981, the judge issued his decision finding that McCoy was discharged on April 22, 1977 in violation of section 110(b) of the Coal Mine Health and Safety Act of 1969; ordered respondent to pay back pay and attorney fees; ordered the parties to advise him in writing by October 15, 1981, whether they had agreed on the amounts of back pay and attorney fees; suggested that further proceedings may be necessary if the parties could not reach an agreement and retained jurisdiction for the purpose of determining the proper award.

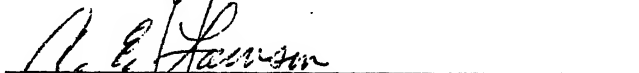
Crescent filed its petition for discretionary review on October 28, 1981 raising questions of law and fact relating to the judge's decision. On November 3, 1981 complainant filed a motion to dismiss Crescent's petition as being premature.

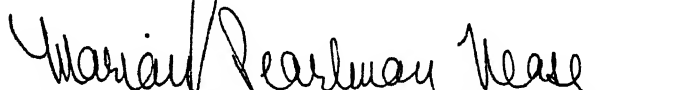
In Gerald D. Boone v. Rebel Coal Company, 3 FMSHRC 1900 (Aug. 6, 1981) and Council of Southern Mountains, Inc. v. Martin County Coal Corporation, 2 FMSHRC 3216 (Nov. 12, 1980) the Commission considered situations analogous to the instant and concluded that failure to resolve monetary awards did not constitute a final disposition by the judge to initiate the running of the statutory review periods under section 113 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (Supp. II 1978). In those cases the petitions for review were dismissed as premature. The reasoning and decisions in those cases are applicable to this proceeding.

Accordingly, complainant's motion to dismiss is granted and the petition for discretionary review filed by Crescent Coal Company is dismissed as premature. The parties may file petitions for discretionary review in accordance with section 113 of the Federal Mine Safety and Health Act of 1977 and Commission Rule 70 (29 C.F.R.2700.70) once the judge has made his final disposition of this proceeding.


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 6, 1981

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. DENV 79-359-PM
:
v. :
:
KNOX COUNTY STONE COMPANY, INC. :

DECISION

This penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The question before us is whether the judge abused his discretion by disapproving the parties' proposed penalty settlement and summarily assessing a \$500 penalty. For the reasons that follow, we vacate the judge's decision and approve the parties' settlement. Due to information disclosed during this review, we also find it necessary to address the subject of ex parte communications between judges and parties.

On October 12, 1978, an MSHA inspector issued Knox County Stone Company a citation for an alleged violation of 30 CFR §56.11-2, 1/ when he observed a catwalk railing torn loose from its foundations. On February 22, 1979, the Secretary petitioned for assessment of a \$40 civil penalty for the alleged catwalk violation. On March 23, 1979, Knox County answered the petition, admitting the violation, contesting the amount of penalty assessed, and requesting a hearing.

On April 24, 1979, the judge issued to the parties a notice of hearing and pretrial order requiring in two phased responses extensive information relevant to the six penalty criteria specified in section 110(i) of the Mine Act. By June 11, when the last response was filed, the parties had significantly narrowed the issues. The only major point in dispute between the parties was the appropriate penalty weight to be assigned for operator size. On June 13, 1979, the judge noticed the hearing for June 29, 1979, in Arlington, Virginia.

On June 26, 1979, Knox County filed a Motion to Dismiss Proceeding and to Approve Settlement. The motion stated that \$36, rather than the originally proposed \$40, would be the appropriate penalty amount, based on an agreed reduction of penalty points for operator size. Also on June 26th, the parties jointly moved for a continuance pending disposition of the dismissal motion and, in the event a hearing was required, for transfer of the hearing site to Kansas City, Missouri. On June 27,

1/ Section 56.11-2 provides:

Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toe-boards shall be provided.

1979, the judge denied the transfer request and continued the hearing. The Secretary subsequently filed a response concurring in Knox County's dismissal motion, including reduction of penalty points for operator size. On July 23, 1979, without having held a hearing, the judge issued his Decision and Order on Motions to Approve Settlement.

The judge disapproved the settlement proposal "because on the basis of an independent evaluation and de novo review of the circumstances the presiding judge is not persuaded that the penalty proposed will deter future violations and insure voluntary compliance." Finding that there were no genuine issues of material fact, the judge concluded that "due process [did] not require an evidentiary hearing to resolve [the] dispute." In effect, the judge treated Knox County's settlement approval motion as a summary judgment motion.

On the basis of the parties' pleadings, the pretrial submissions, and the inspector's violation "statement," the judge made the following findings relevant to the six penalty criteria: the violation was admitted; there was no past history of violations; regarding Knox County's size, its annual sales volume was approximately \$1,000,000; the judge accepted Knox County's concession that a "low degree of negligence" was involved in the violation; "it [was] not claimed" that the assessment of any penalty found warranted would impair Knox County's ability to continue in business; regarding gravity, the violation was "serious" because according to the "undisputed findings" in the inspector's violation "statement," a fall from the catwalk, while "improbable," would "probably result" in disabling injury if it did occur; and it was conceded by the Secretary that compliance was "rapid." Based on these findings, the judge concluded that \$500 was the penalty "appropriate to the size of the respondent and ... best calculated to deter future violations and insure voluntary compliance."

Knox County's Petition for Discretionary Review ("PDR") raises two major issues: (1) whether the judge properly rejected the proposed penalty settlement, and (2) whether his summary assessment of the \$500 penalty was proper. The Secretary filed a brief in support of the PDR. Because the judge's summary assessment of the \$500 penalty was predicated on his rejection of the proposed \$36 penalty, we first consider whether he properly rejected the settlement.

We initially summarize the general principles relevant to this issue. Section 110(k) of the Mine Act ^{2/} directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives. Co-op Mining Co., 2 FMSHRC 3475, 3475-76 (1980). The judges' front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion. While the scope of this discretion may elude detailed description, it is not unlimited and at least some of its outer boundaries are clear.

^{2/} In relevant part, section 110(k) provides:

No proposal penalty which has been contested before the Commission ... shall be compromised, mitigated, or settled except with the approval of the Commission.

The text of section 110(k) requires us to reject the notion lurking in Knox County's brief that Commission judges are bound to endorse all proposed settlements of contested penalties. Co-op Mining Co., supra. However, settlements are not in disfavor under the Mine Act, and a judge is not free to reject them arbitrarily. Our standards for decision and review in settlement cases are consistent with these "outer boundaries."

Commission Rule 30(c), 29 CFR §2700.30(c) (amended 1980), provides that the judge's order "approving a proposed settlement shall set forth the reasons for approval and shall be fully supported by the record." 3/ Similarly, in Davis Coal Co., 2 FMSHRC 619 (1980), the Commission affirmed several settlement approvals where the judges "considered the reasons for the proposed settlements and weighed the [statutory penalty] criteria...." 4/ Although neither Rule 30(c) nor Davis Coal directly addresses the roles of the judge and the Commission where proposed settlements are rejected, the decisional and review standards relevant to settlement approval apply equally to these cases. Rejections, as well as approvals, should be based on principled reasons. Therefore, we held that if a judge's settlement approval or rejection is "fully supported" by the record before him, is consistent with the statutory penalty criteria, and is not otherwise improper, it will not be disturbed. In reviewing such cases, abuses of discretion or plain errors are not immune from reversal. Co-op Mining Co., 2 FMSHRC at 3475-76 (rev'g a judge's approval of a penalty settlement where the record disclosed no underlying violation); Cf. Mettiki Coal Corp., (No. YORK 80-140, October 16, 1981) (rev'g judge's rejection of Secretary's dismissal motion premised on full payment of proposed penalty).

In light of the foregoing general principles, we turn to the propriety of the judge's rejection of the proposed penalty settlement. The judge's rejection of the settlement turned on his determination that the proposed penalty would not "deter future violations and insure voluntary compliance." The judge did not explain the reasons for this conclusion in any detail. He indicated, however, that a fall from the catwalk, "while improbable," would probably result in a disabling injury, and commented that his substituted \$500 penalty was "appropriate to the size" of Knox County--thereby implying that a \$36 penalty was not.

3/ Rule 30(c) was revised in 1980 to delete the requirement, which was in effect when this case was decided, that the judge "consider" and "discuss" the six statutory penalty criteria in orders approving settlements. As the Federal Register commentary accompanying the amendment makes clear, the only purpose of the revision was "enhance[ment]" of the "flexibility of the judges to approve the settlements...." 45 Fed. Reg. 44,301-302 (1980). The amended rule permits judges to issue simpler and briefer settlement decisions, free from the burden of separately discussing each of the penalty criteria. The amendment does not sanction settlement decisions inconsistent with the statutory penalty criteria.

4/ In the analogous context of reviewing a judge's penalty assessments in a contested case, we refused to disturb penalty assessments "based on the evidence in the record and [on] correct consideration of the statutory criteria...." Shamrock Coal Co., 1 FMSHRC 469 (1979).

We conclude that the judge's rejection of the settlement is not "fully supported" by the record and is inconsistent with the penalty criteria. As a threshold matter, the proposed \$36 penalty is not offensive in principle. When the Mine Act was enacted, there was a justified congressional concern over the general pattern of low penalties under the 1969 Coal Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. 41-5 (1977), reprinted in Subcommittee on Labor, Comm. on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 629-33 (1978). However, this concern was not a prospective condemnation of low penalties or minor compromises in every case that might arise under the new statute. Relatively minor or technical violations of the Mine Act can, and with some frequency, do occur. As the Commission recently stated: "If it is found in a given case that a low penalty is warranted, a low penalty may, of course, be assessed." Tazco, Inc., 3 FMSHRC 1985, 1989 (1981). The record and penalty criteria support the penalty agreed to by the parties.

As the judge recognized, the pleadings and pretrial submissions show that Knox County had no history of violations and engaged in rapid compliance once cited. The inspector's violation "statement," on which the judge based his gravity findings, indicated that the risk of fall from the catwalk was "improbable." While we do not dispute the judge's findings concerning the other criteria, we think that a \$36 penalty is reasonable and appropriate for a rapidly corrected first violation posing only improbable risk of harm. Similarly, we do not view the \$4 difference between the originally proposed penalty and the one agreed to in settlement as the kind of excessive compromise criticized by Congress. The judge's conclusion that \$36 was insufficient for deterrence purposes is not, as noted, above, explained in detail. In short, we think that rejection of this proposed settlement unnecessarily impugns the settlement process and represents zealous, rather than wise, enforcement of the Mine Act.

Accordingly, we reverse the judge's rejection of the proposed penalty in the settlement motion. Ordinarily, we would remand a case in this posture for further proceedings. However, because this case involves a small penalty sum and has been on the Commission's docket for some time, and because we believe that the \$36 penalty proposed penalty is appropriate, we hereby approve the parties' settlement motion. Cf. Consolo v. FMC, 383 U.S. 607, 621 (1965) (approving disposition at the appellate level, rather than the ordinary course at remand, where a case has been pending for sometime and the relevant legal principles are "not hard to apply").

While the preceding disposition dictates reversal of the judge's summarily assessed \$500 penalty, we also note that the judge's treatment of Knox County's settlement motion was a form of sua sponte summary judgment, an extraordinary procedure not authorized by our rules. In Missouri Gravel Coal Co. (No. LAKE 80-83-M, November 4, 1981) we disapproved of sua sponte summary judgment in general, and we reject the judge's use of it here as well. As we recently observed, "if a judge disagrees with a stipulated penalty amount in a settlement, he is free to reject the settlement and direct the matter for hearing." Tazco Inc., 3 FMSHRC at

1898. Accordingly, we also vacate the judge's summary assessment of the \$500 penalty. 5/

In sum, for the foregoing reasons, we vacate the judge's rejection of the parties' settlement motion and his summary assessment of a \$500 penalty, and approve the parties' motion for a \$36 penalty in settlement of the case. 6/ As we noted at the outset, this case also requires us to discuss ex parte communications. Although the following discussion is necessitated by information disclosed during review, we emphasize that it is extrinsic to the matters on review.

In support of contentions that the judge was biased and had prejudged the case (issues not necessary to resolve at this point (see n. 6)), Knox County alleged in its PDR that on June 20 and July 3, 1979, its principal counsel had telephone conversations with the judge regarding the case. That counsel's affidavit concerning the conversations was attached to the petition. The alleged conversations occurred prior to the judge's decision--the first after the judge's notice of hearing and last pre-trial submission but prior to the motion to approve settlement, and the second after the settlement motion. Knox County stated that the conversations were "initiated" by the judge or "persons in his office." On September 6, shortly after the Commission directed this case for review, the judge filed his own affidavit with the Commission. The judge stated that he had read Knox County's counsel's affidavit, and acknowledged that he had spoken with him on June 20. The affidavits contained partly conflicting accounts of the substance of the conversations.

5/ Of course, where settlement is rejected and the case is directed for hearing, if the parties believe that the facts are not in dispute, they can move the judge for summary judgment (Commission Rule 64, 29 CFR §2700.64) and present argument on the appropriate penalty size.

6/ Our disposition of the case remedies Knox County's other complaints regarding the judge's decision and renders discussion of them unnecessary.

Apart from the two affidavits, no record of these conversations was placed on the public record of the proceedings.

These affidavits concur on one point: the attorney and the judge appear to have discussed the case off the public record and without the presence of the Secretary, the other party to the proceeding. We will not direct a separate disciplinary proceeding to determine whether these apparent facts make out a prohibited ex parte communication. The parties have at least brought the matter to our attention, the conversations occurred over two years ago, and we have not previously addressed the subject of ex parte communications. However, because the subject of ex parte communications has arisen and because we believe that the prohibitions against ex parte communications are vital to the integrity of the Commission's processes, we take this occasion to provide future guidance for Commission judges and those who practice before the Commission.

Our procedural rules have always prohibited ex parte communications, although there have been permutations in language and organization as rule revisions have occurred. Rule 82, the present rule on ex parte communications, provides:

(a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.

(b) Procedure in case of violation.

(1) In the event an ex parte communication in violation of this section occurs, the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.

(2) All ex parte communications in violation of this section shall be placed on the public record of the proceeding.

(c) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commissioners, or docket information shall be directed to the Office of the Executive Director of the Commission

Moreover, apart from our own rules, section 557(d) of the APA also prohibits ex parte communications. As part of the Government in the Sunshine Act, Congress amended section 557 in 1976 to add a new subsection (d) set forth in the accompanying note. 7/ Section 557(d)

7/ §557(d) provides in relevant part:

(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law:-

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body composing the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications;

and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

applies to the Commission's adjudicative proceedings, including penalty proceedings conducted pursuant to section 105(d) of the Mine Act.

As a comparison of Rule 82 and section 557(d) shows, both rules prohibit ex parte communication between a judge and a party regarding the merits of a pending case and also require that ex parte communications be placed on the public record. Our rules do not expressly define "ex parte communication." However, section 551(14), APA, defines the term as follows:

"[E]x parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding . . .

At the very least, we think "merits of a case" embraces discussion of a case's issues and how those issues should or will be resolved. 8/

The rules against ex parte communications serve important goals essential to the integrity and fairness of Commission proceedings. As Congress explained in enacting section 557(d):

The purpose of the provisions in the bill prohibiting ex parte communications is to insure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.

* * * *

In order to ensure both fairness and soundness to adjudication, the . . . [APA] require[s] a hearing and decision on the record. Such hearings give all parties an opportunity to participate and to rebut each other's presentations. Such proceedings cannot be fair or soundly decided, however, when persons outside the agency are allowed to communicate with the decision-maker in private and and others are denied the opportunity to respond.

1976 U.S. Code Legis. Hist. 2184, 2227. See also Raz Inland Navigation Co., Inc. v. ICC, 625 F.2d 258, 260 (9th Cir. 1980). The implications of the purposes mentioned by Congress are obvious: improper ex parte contacts may deny a party "his due process right to a disinterested and impartial tribunal." Rinehart v. Brewer, 561 F.2d, 132 (8th Cir. 1977). Diminishing public confidence in the affected tribunal is the likely and unacceptable result.

These considerations are mirrored by the canons of judicial and professional conduct. Canon 3A(4), Code of Judicial Conduct, provides in relevant part:

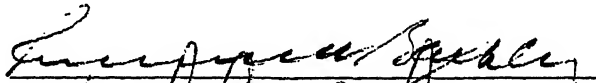
8/ Congress intended the phrase "merits of the proceeding," in sections 551(14) and 557(d) to be broadly construed. See H. Rep. No. 94-880, Parts I & II, 94th Cong., 2d. Sess. 20 (Part I), 20 (Part II) (1976), reprinted in 1976[3] U.S. Code Cong. & Ad. News 2202, 2229 ["1976 U.S. Code Legis. Hist."].

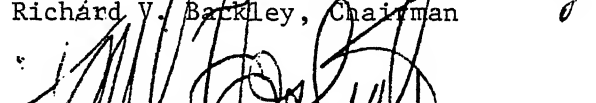
A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

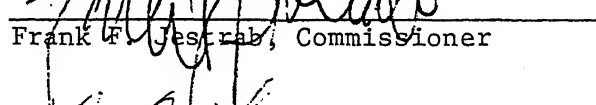
Violation of this canon may so taint a proceeding as to mandate reversal. See Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444, 447 (6th Cir. 1980); Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593, 596-99 (5th Cir. 1977). 9/ Similarly, Disciplinary Rule 7-110(b) under Canon 7, Code of Professional Responsibility, prohibits a lawyer from engaging in ex parte communications with a judge during an adversary proceeding. The gravity of a violation by an attorney is underscored by sections 556(e) and 557(d)(1)(D), APA, which permit agencies to remedy a violation by means as extreme as dismissal.

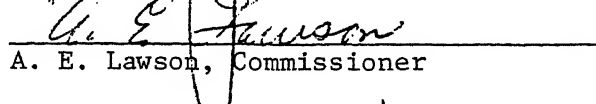
We recognize that innocent or de minimis ex parte communications can, and do, occur. When ex parte communications occur, however, they shall be placed on the public record in accordance with appropriate procedure.

In short, although as discussed above, it is not necessary to direct a disciplinary hearing in this case, we expect that the rules on ex parte communications will be respected in both letter and spirit and that judges and lawyers will avoid even the appearance of impropriety in these matters.


Richard V. Backley, Chairman


Frank F. Jeschke, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

9/ We note that a judge may not indirectly engage in such communications through contacts by his clerks or other employees with outside parties. Price Brothers, supra, 629 F.2d at 447; Kennedy, supra, 551 F.2d at 596.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 6, 1981

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. BARB 77-266-P
	:	BARB 76X465-P
v.	:	
	:	
JIM WALTER RESOURCES, INC.	:	
	:	
and	:	
	:	
COWIN AND COMPANY, INC.	:	

DECISION

The issue presented in these cases is whether 30 CFR §77.1903(b) is a mandatory safety standard. Section 77.1903(b) provides:

The American National Standards Institute, "Specifications For The Use of Wire Ropes For Mines," M 11.1-1960, or the latest revision thereof, shall be used as a guide in the use, selection and maintenance of wire ropes used for hoisting.

For the reasons that follow, we hold that this standard imposes no mandatory duty on an operator.

The events leading to the issuance of notices of violation of §77.1903(b) occurred on June 9, 1975. Cowin and Company, an independent contractor, was sinking a production shaft at Jim Walter Resources' Brookwood No. 4 Mine. One of the tugger ropes that operated a "clam-shell" used in excavation broke. More than 1026 feet of wire rope fell to the shaft bottom, striking and killing a Cowin employee.

After a hearing an administrative law judge determined that the notices of violation lacked the required specificity and deprived the respondents of reasonable notice as to the violation charged. The judge vacated the notices of violation and dismissed the petitions for assessment of a penalty. We reversed his decision because the operators had not demonstrated prejudice from the lack of specificity. In remanding for further proceedings, we also instructed the judge to address the threshold question of whether §77.1903(b) is a mandatory standard for which a civil penalty must be assessed if it is violated. 1 FMSHRC 1827, 1830 (1979).

On remand the judge held that whether or not §77.1903(b) is mandatory depends upon which ANSI standards are alleged not to have been used as a guide. 2 FMSHRC 1890 (1980). In the judge's view, if the underlying ANSI standards are mandatory, then §77.1903(b) is mandatory and a

penalty must be assessed for a violation thereof. The judge also held that if the underlying standards are advisory, as he concluded those referred to by the Secretary in these cases were, then §77.1903(b) is advisory and no penalties could be assessed. Accordingly, he vacated the notices of violation and dismissed the petitions for assessment of a penalty.

On review of this decision, the Secretary argues that §77.1903(b) is a mandatory standard that at a minimum requires consultation with the specified ANSI standards. The purpose of this requirement, he asserts, "is to ensure a process" by which an operator, having consulted a leading national authority on the subject, will make an informed choice regarding selection and use of wire ropes. The Secretary urges that in the present cases the Commission need not decide whether §77.1903(b) requires that individual ANSI sections be followed. Rather, he submits that the Commission should hold that the operators here did not comply with even the minimum requirements of §77.1903(b) by not consulting the ANSI standards. The Secretary admits that "reasonable persons may differ as to whether a given ANSI standard is mandatory or advisory". ^{1/} He believes, however, that this fact supports his position, rather than detracts from it. In sum, the Secretary claims that the judge's interpretation of §77.1903(b) renders the words "shall be used as a guide" "utterly superfluous."

Jim Walter and Cowin argue that §77.1903(b) is advisory because it incorporates advisory industry standards. The operators rely on an introductory paragraph of the ANSI standards at issue which states: "The existence of [an ANSI] standard does not in any respect preclude anyone, whether he has approved the standard or not, from manufacturing, marketing, purchasing, or using products, processes, or procedures not conforming to the standard." The operators also argue "the frequent

^{1/} We agree with the Secretary that reasonable people can differ on whether a particular ANSI section is mandatory or advisory. The following 1960 ANSI standards, which were in effect at the time these notices were issued, and to which the Secretary referred in these cases, illustrate this problem:

ANSI Standard 6.3.1.1 states:

It is essential that the tread diameters of sheaves and drums be liberal. The recommended diameters should be at least as large as those listed in Table 36, Column 1. It is inadvisable to operate with minimum diameters below those in Column 2. On large mine hoist installations using 6 x 19 rope, the head sheaves are sometimes set as high as 90 times the rope diameter.

ANSI standard 5.2.1 states in part:

Wire rope should be handled so that it is neither twisted nor untwisted. Care must be exercised in handling to avoid "kinking" of the wire rope...

The difficulty of determining whether an ANSI section is mandatory or advisory has been alleviated somewhat by the 1980 revision of ANSI Standards For Wire Rope for Mines, ANSI M 11.1-1980. The new ANSI standards generally use either "should" or "shall" and section 1.5 provides:

Mandatory and Advisory Rules. In this standard, the word "shall" is to be understood as denoting a mandatory requirement; the word "should" is advisory in nature and is to be understood as denoting a recommendation.

use of terms such as 'should be', 'recommended', and 'advisable' throughout these [ANSI] sections" show that they are not mandatory. They further assert that mere incorporation of the "advisory" standards into §77.1903(b) can not change them from advisory to mandatory and that if the ANSI standards were intended to be mandatory, a substantive modification has occurred without resort to proper rulemaking procedures. They note that §77.1903(b) is unusual in containing the phrase "use[] as a guide" and argue that this shows an intent to maintain the ANSI standards as advisory. 2/ Finally, Jim Walter and Cowin reject the Secretary's argument that the standard at least imposes a mandatory duty to consult the ANSI standards. They assert this requirement would be meaningless and unenforceable. For example, they note that two operators who employ identical wire rope practices would be subject to different enforcement treatment depending on whether they had "consulted" ANSI before implementing their practices.

We hold that §77.1903(b) imposes no mandatory duty and, therefore, cannot be the basis for assessment of a civil penalty. The standard provides that ANSI standards "shall be used as a guide in the use, selection and maintenance of wire ropes used for hoisting." The phrase "shall be used as a guide" is, at best, ambiguous. It contains mandatory language, *i.e.*, "shall be used", but the requirement imposed is use of ANSI standards "as a guide". We believe that in common usage a "guide" is something less than a mandatory requirement to be followed. 3/ Although safety and health standards are to be construed liberally, any resultant interpretation must be reasonable in order to be upheld. Hanna Mining Co., 3 FMSHRC 2045, 2048 (1981). In light of the ambiguous language of §77.1903(b) and the ambiguous nature of many of the underlying ANSI standards, we find the Secretary's attempt to derive an enforceable mandatory duty from the standard to be unreasonable. 4/

The fault with the standard lies in its wording. It does not adequately inform an operator of a duty that must be met. This fault can easily be remedied by the Secretary through rulemaking and we urge him to do so. 5/ This case emphasizes the need for mandatory standards for wire ropes.

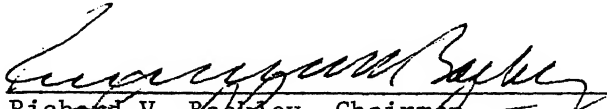
2/ Other regulations incorporate industry developed standards and require compliance with those standards rather than their "use as a guide." See, *e.g.*, 30 CFR §§75.518-1; 77.506; 77.516, (National Electric Code); 30 CFR §§75.1101-7(a), 75.1103-2(b), 75.1107-3(b) (National Fire Code).

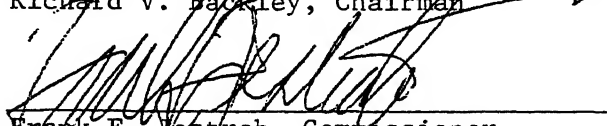
3/ Webster's Third New International Dictionary (1971), provides that a "guide" is: "c. something (as a guidebook, signpost, or instruction manual) that provides a person with guiding information."

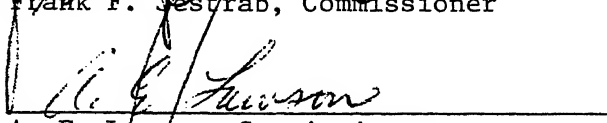
4/ We agree with the Secretary that an operator's consultation with recognized authorities on safe work practices is desirable. Without a corresponding duty to implement suggested work practices after consultation, however, any desired safety return seems extremely tenuous when measured against the practicalities of enforcement.

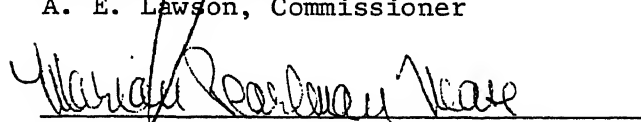
5/ We note that the Secretary may have already begun this process. On April 28, 1981, he announced his intention to revise the current wire rope standards and to include specific requirements for the installation, use, inspection, maintenance, and removal of wire ropes. 46 Fed. Reg. 2389 (1981). We also note that the Secretary has solved similar problems with other standards through rulemaking. For example, 30 CFR §§55.19-20, 56.19-20, and 57.19-20 formerly provided that the ANSI specifications at issue in this case "should be used as a guide." In a general revision, these standards were revoked and many other provisions were expressly made mandatory. 44 Fed. Reg. 48490 (1979).

Accordingly, we affirm the judge's decision dismissing the petitions for assessment of penalties insofar as it is consistent with this opinion.


Richard V. Backley, Chairman


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 6, 1981

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket Nos. HOPE 76-210-P
ADMINISTRATION (MSHA)	:	HOPE 76-211-P
	:	HOPE 76-212-P
v.	:	HOPE 76-213-P
	:	
COWIN AND COMPANY, INC,	:	

DECISION

This case was initiated under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977)("the Coal Act"). We directed for review the question: Whether 30 CFR §77.1903(b) is a mandatory safety standard. 1/ For the reasons expressed in our decision in Jim Walter Resources and Cowin and Company, FMSHRC (BARB 77-266-P, etc., November 6, 1981), we hold that it is not.

We also reject the Secretary of Labor's claim that this question is not properly before us in this case. The Secretary asserts that Cowin did not challenge the mandatory nature of §77.1903(b) in its petition for review of the administrative law judge's first decision in this matter. Therefore, the Secretary argues that the issue of the validity of §77.1903(b) became final forty days after the judge issued his first decision and can not now be addressed. 30 U.S.C. §823(d). The Secretary also asserts that, in examining the issue, the Commission would exceed the scope of the remand from the Fourth Circuit. Cowin and Co. v. FMSHRC, 612 F.2d 838 (4th Cir. 1979).


We do not believe the Fourth Circuit foreclosed consideration of whether §77.1903(b) is mandatory. In its decision, the Court stated, "[W]e think the administrative record should be reopened, to avoid any possible prejudice, for the submission of additional relevant evidence and arguments before Cowin's civil liability is determined and penalties can be assessed...." 612 F.2d at 841. Because the Court's direction to remand allowed the administrative law judge to hear additional arguments, we find that Cowin properly raised the issue of the mandatory nature of the standard before the judge. In view of this, and because Cowin's petition for discretionary review presented the question of whether the standard is mandatory, that issue is properly before us on review.


1/ Section 77.1903(b) provides:

The American National Standards Institute, "Specifications For The Use of Wire Ropes For Mines," M 11.1-1960, or the latest revision thereof, shall be used as a guide in the use, selection and maintenance of wire ropes used for hoisting.

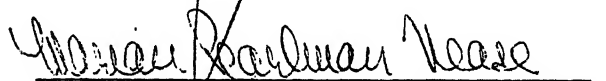
Furthermore, in light of our decision in Jim Walter Resources, it would be manifestly unjust to refuse to reach the issue. To do so would mean that Cowin would be assessed penalties totalling \$16,000 for violating a standard that we have found imposes no mandatory duty.

Accordingly, the decision of the administrative law judge is reversed and the petitions for assessment of penalties are dismissed.


Richard V. Backley, Chairman


Frank F. Vestrob, Commissioner


A. E. Lawson, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
v.
KERR-McGEE CORPORATION

November 6, 1981
:
:
:
:
Docket No. CENT 79-156-M
:
:

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et. seq. (Supp. III 1979). The administrative law judge concluded that Kerr-McGee Corporation had violated 30 CFR §57.15-5, a mandatory safety standard, and assessed a penalty. 1/ The major issue before us is whether the judge erred in his interpretation of section 57.15-5, which provides in relevant part:

Safety belts and lines shall be worn when men work where there is danger of falling....

For the reasons that follow, we affirm the judge's decision.

The citation was issued following an investigation of a fatal fall accident at Kerr-McGee's uranium mine near Gallup, New Mexico. The accident occurred in a partially completed vertical shaft that was 1,471 feet deep and 14 feet in diameter. Kerr-McGee intended to use the shaft for hoisting muck and supplies. In the floor of the shaft was a borehole approximately 3 feet in diameter and extending 54 feet below the shaft floor to a slusher passageway underneath. The borehole's opening in the floor was blocked by a plug. When miners working in the shaft needed to remove the muck that typically accumulated on the shaft floor, they raised the plug and swept the muck down the borehole. The plug was raised and lowered by attaching it to the sinking bucket used to transport the men and materials.

On the day of the accident, two miners were installing wire mesh on the shaft ribs near the bottom of the shaft. At one point, they needed to sweep out some muck on the shaft floor. The lead miner climbed into the bucket in order to hoist the borehole plug. He tossed a 20-foot long cable to the other miner, the victim. The victim fastened one end of the cable to the mesh on the shaft ribs, and attached the other end of the cable to the D-ring of his safety belt. He intended to use the

1/ The judge's decision is reported at 2 FMSHRC 3190 (1980).

cable as a safety line while he stood on the floor of the shaft and swept the muck down the borehole. 2/

While the victim was standing on the floor next to the rib, the plug was raised approximately two feet. Because the borehole was located off-center in the shaft floor, the plug swung when it was raised, causing the lead miner to lose sight of the victim. Subsequently, the lead miner peered over the side of the bucket and observed the victim's safety line hanging in the borehole. Neither the wire mesh nor the cable had broken, but the D-ring of the victim's safety belt had torn loose and remained attached to the end of the cable. The cable extended 9.5 feet into the borehole. The victim's body was recovered in the slusher passageway 54 feet beneath the shaft floor.

The judge found that the operator had supplied the victim with a safety belt and line, but upheld the citation because the victim had not used the equipment in a manner that would have prevented the 9.5-foot fall down the borehole. 2 FMSHRC at 3191-92. The judge indicated that the proper way to use a long safety line is to tie it off to a shorter length. Id. at 3192. In essence, the judge concluded that section 57.15-5 requires that safety belts and lines be used in a safe manner. Kerr-McGee argues on review that the standard literally requires operators only to supply miners with safety belts and lines. It apparently concedes, however, that the belts and lines supplied must be defect-free. Reply br. 5. Kerr-McGee contends that it complied with the standard's mandate by supplying the victim with a defect-free belt and line. We do not agree.

We first construe the general meaning of section 57.15-5. As contrasted with more detailed regulations, it is the kind made simple and brief in order to be broadly adaptable to myriad circumstances. From an operator's standpoint, one benefit of this flexible regulatory approach is that it affords considerable leeway in adapting safety requirements to the variable and unique conditions encountered in different mines. Although a literal reading of the standard might suggest that compliance is achieved whenever a miner wears any kind of line in any manner, such an interpretation is inconsistent with the purposes of the Part 57 regulations and this standard in particular.

30 CFR §57.1 describes the purpose of the Part 57 regulations as "the protection of life, the promotion of health and safety, and the prevention of accidents...." Consistent with that general aim, the specific purpose of section 57.15-5 is the prevention of dangerous falls. Dangerous falls will not be prevented if defective belts and lines are worn or if even good equipment is used in an unsafe manner. For example, common sense suggests that a well constructed 15-foot

2/ Kerr-McGee constructed this cable as well as the other cables and safety lines used at its mine. The standard length for cables that Kerr-McGee identified as "safety lines" was 10 to 15 feet. The cable involved here, however, was 20 feet in length and had been used to tie down bundles of wire mesh and transport equipment up and down the shaft. Kerr-McGee's cables were all made of the same material, were the same color, and were not specifically labeled to distinguish the safety lines.

safety line is not going to supply adequate protection for a miner working above a 10-foot dropoff. Therefore, we hold that the "shall be worn" language of the standard necessarily means worn safely and properly.

There is no dispute that the victim was wearing an approved safety belt and a 20-foot cable he intended to use as a safety line. Therefore, the primary question is the manner in which he used the equipment. We begin our analysis by examining whether, given the language of the standard, there was a "danger of falling".

When the victim tied off the cable on the ribs of the shaft, he was working on the shaft floor which was covered with muck. He was preparing to sweep muck down the borehole in the shaft floor. Once the blocking plug was hoisted from the borehole, he would be working in proximity to the open borehole. Under these circumstances, we find that the "danger of falling" he faced was slipping or otherwise losing his balance in the muck and falling down the open 54-foot long borehole. This danger is underscored by the facts that the borehole was kept plugged, obviously in part to prevent falls down the hole, and that the victim tied himself off just prior to the raising of the plug.

Since the miner's actual accident does not ipso facto prove a violation, our focus regarding safe use is on the adequacy of what the miner did when faced with this danger of falling. The victim tied himself off in a manner that permitted a possible 9.5 foot fall into the borehole. The uncontroverted evidence in this case establishes that long falls subject the person involved, the safety line and belt, and all attachment or anchorage points to great stress, and that a 9.5-foot fall was too long to be considered safe. 2 FMSHRC at 3191-2; Tr. 26, 31, 34-6, 61, 95-5, 103. For example, this evidence specifically showed that the victim's safety belt had been designed and laboratory tested to withstand three successive drops of a 250-pound rigid weight free falling a distance of 6 feet. 2 FMSHRC at 3192; Tr. 34-6. When the miner tied himself off in a manner that permitted a possible 9.5 foot fall into the borehole, he created a situation in which such a fall would produce a stress virtually meeting, if not exceeding, the performance standards of the safety belt. 3/ We therefore agree with the judge that the equipment was not used safely because the line was not shortened sufficiently by tying off to prevent a hazardously long fall. 4/

3/ Kerr-McGee presented mathematical calculations that since the victim weighed 155 pounds, the belt should have been able to withstand a free fall of 9.68 feet. 2 FMSHRC at 3192. As the judge pointed out, following this mathematical approach to its logical conclusion, the victim's tying off in such a manner that a 9.5 fall was possible would leave him a theoretical safety margin of .18 of a foot, i.e., 2.16 inches, under laboratory conditions. Id. Assuming the accuracy of these calculations, we observe, however, that the calculations overlook the additional stress created by the weight of his clothing, equipment, and, indeed, the safety line itself. We further note that mines are not laboratories and miners are not experimental "rigid weights." A .18-foot theoretical "safety margin" is probably non-existent under conditions of actual use, where the hazards of mine work militate against subjecting such equipment to its absolute laboratory limits.

4/ We note that Kerr-McGee's general mine foreman at the mine where the accident occurred testified that the failure to shorten the cable

Kerr-McGee argues that even if the miner used the equipment unsafely, it was not responsible for his actions and therefore should not be held liable for any violation. However, the Mine Act, like the 1969 Coal Act, provides for the imposition of liability without regard to fault. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-9 (1981). Therefore, the judge correctly pointed out that fault is properly a matter for the penalty assessment stage of proceedings under the Mine Act. Cf. Nacco Mining Co., 3 FMSHRC 848, 849-51 (1981), and authorities cited (holding, in a 1969 Coal Act case, that a foreman's aberrant conduct, while imputable to operator for liability purposes, may be considered in weighing the operator's "negligence").

In any event, Kerr-McGee is not entirely blameless with regard to the miner's unsafe use of the equipment. The cables used by Kerr-McGee for hoisting materials or tying down bundles of mesh were identical in appearance to the cables used as safety lines, differing only in their length. Thus, it is not surprising that, as happened here, a hoisting cable exceeding the 10 to 15 foot designated length for safety lines was used as a safety line. 5/

fn. 4/ continue
was unsafe use:

Q. Mr. Eroh, is it your opinion that the fashion in which [the victim] used the 20-foot cable sling was improper?

A. Yes.

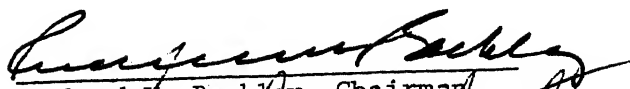
Q. So if he would have doubled it and made it 10 feet long that, in your opinion, would be proper?

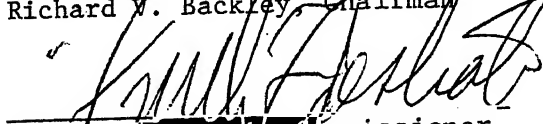
A. For that particular cable.


Tr. 121 (recross-examination by the Secretary).

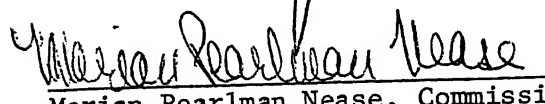
5/ We further note that the judge's statement regarding the tying off of long lines is not necessarily a panacea. The standards of the American National Standards Institute indicate that a knot in a rope reduces the rope's strength by 50%. Tr. 34. Repeated tying off of long lines may also result in structural damage to the lines.

For the foregoing reasons, we affirm the decision of the judge. 6/


Richard W. Backley, Chairman


Frank F. Jettan, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

6/ Kerr-McGee raises substantial evidence objections on the liability issue that are beside the point given our analysis. Kerr-McGee argues that the Secretary failed to establish the causes of the miner's fall and of the failure of the belt. It contends that the central conclusions relating to the fall are mere speculations since no one actually witnessed the accident. Kerr-McGee hypothesizes that the broken attachment ring on the belt could have been caused by impact against sharp rocks in the borehole or shaft. The immediate causes of the fall and belt failure do not go to the essence of the violation--that the line was not sufficiently and safely tied off to prevent a dangerous fall into the borehole. Thus, the judge's and our decisions mean that a violation occurred once the line was improperly tied off, regardless of whether the miner actually proceeded to fall into the borehole.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 12, 1981

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. DENV 76-83-P
Petitioner	:	DENV 76-84-P
	:	DENV 76X99-P
v.	:	DENV 76X100-P
	:	
MID-CONTINENT COAL AND COKE COMPANY,	:	IBMA 77-14
Respondent	:	
	:	

DECISION

This penalty proceeding arises under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801-960 (1976)(amended 1977) (the Act). After an evidentiary hearing and decision by an administrative law judge, Mid-Continent Coal and Coke Company appealed the judge's finding of a violation with respect to one order and five notices issued by the Mining Enforcement and Safety Administration (MESA).^{1/} For the reasons stated below, we vacate Notice No. 5-105 (2-RLM) and affirm the judge's decision as to the remaining order and notices.^{2/}

^{1/}Order No. 5-073-C (1-RLM) dated April 8, 1975

Notice No. 5-083 (1-RLM) dated April 24, 1975

Notice No. 5-085 (3-RLM) dated April 24, 1975

Notice No. 5-105 (2-RLM) dated June 5, 1975

Notice No. 5-214 (7-LBL) dated October 2, 1975

Notice No. 5-219 (4-LBL) dated October 3, 1975

^{2/}On March 8, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals under the 1969 Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 961 (Supp. III 1979). MESA's enforcement responsibilities were transferred to the Department of Labor's Mine Safety and Health Administration (MSHA), and MSHA is substituted as the petitioner in this appeal.

Order No. 5-073-C (1-RLM), April 8, 1975

This order alleged a violation of 30 CFR 75.308 in that the quantity of air reaching the working face of No. 1 entry was inadequate to maintain the methane below 1.0 percent.^{3/} Mid-Continent does not dispute the readings taken by MESA showing 1 or more percent of methane at the working face but state they check the face for methane after each cutting and, if methane in excess of one percent is found, they cut the power, wing the curtain to increase the air to clear the methane and recheck the face. While this is continued throughout the working day, Mid-Continent acknowledges this procedure to be only a temporary solution.

The record clearly shows that the changes or adjustments made by Mid-Continent do not maintain the methane content at the level required by the regulation. According, we affirm the judge in finding a violation as alleged.

Notice No. 5-083 (1-RLM), April 24, 1975

This notice asserts a violation of 30 CFR 75.308 ^{3/} because a continuous miner was not deenergized immediately when the methane monitor on the continuous miner indicated more than 1 percent methane.

3/30 CFR 75.308 provides: Methane accumulations in face areas. "If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contain 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane. [Emphasis supplied].

30 CFR 75.308-1 provides: "The "changes or adjustments" which shall be made in the ventilation means increasing the quantity or improving the distribution of air in the affected working place to the extent sufficient to reduce and maintain the methane content less than 1.0 volume per centum when operations are resumed." [Emphasis supplied].

The facts are undisputed. Approaching the face of a crosscut, both the inspector and respondent's superintendent observed a continuous miner backing away from the face with the amber light on its methane monitor glowing. The glowing light indicated the presence of over 1 percent methane. The superintendent proceeded to the face and took two methane readings before ordering the continuous miner deenergized.

We interpret 30 CFR 75.308 and its statutory authority, section 303(h)(2) of the Act, to require electric face equipment in a working place be deenergized immediately when 1 percent or more of methane is detected in such working place. After such methane accumulation had been detected by the methane monitor here, to continue an ignition source while rechecking the monitor's reading was a violation of the regulation alleged. The judge is affirmed.

Notice No. 5-085 (3 RLM), April 24, 1975

This notice was issued alleging a violation of 30 CFR 75.316 4/ because of insufficient ventilation at a working face. The air movement was not sufficient to measure by using an anemometer. Respondent admitted that the quantity of air was not sufficient to permit mining operations, and that their ventilation plan required 15,000 cubic feet per minute, but only when coal was being cut, mined or loaded. Respondent argued that, at the time the notice was issued, a break-through had just been made, the continuous miner had been backed out preparatory to cleaning up the crosscut and reestablishing ventilation at which time there was no cutting, mining or loading coal to be in violation of their ventilation plan and 30 CFR 75.316.

The parties do not dispute that the requirements of a duly adopted ventilation plan are generally enforceable under the Act. Ziegler Coal Company, 4 IBMA 30, aff'd 536 F.2d 398, 409 (D.C. Cir.) (April 22, 1976). Here, the area cited was a working face, the continuous miner had just backed away from the face to allow the crosscut to be cleaned up and ventilation reestablished for further cutting in the production of coal. A temporary halt in cutting, mining or loading to permit other mining activities in preparation for further mining and production does not interrupt the ventilation requirements of 30 CFR 75.316. To hold otherwise would allow unsafe conditions, as in this instance, to escape sanction unless the operator were caught in the act of cutting, mining or loading. The judge's finding of violation is affirmed.

4/30 CFR 75.316 provides: "A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months."

Notice No. 5-105 (2-RLM), June 5, 1975

This notice alleged a violation of 30 CFR 70.201 5/ in that respondent did not collect an accurate respirable dust sample from one of its employees. The respirable dust pump was not operating properly as it had no flow rate. Mid-Continent argued that the pump was properly maintained, that it was operating properly when issued to the employee and that any mechanical malfunction, not attributed to its negligence, does not constitute a violation.

We vacate this notice. See our decision in V and R Coal Company, 3 FMSHRC _____, (Nov. 14, 1981).

Notice No. 5-214 (7-LBL), October 2, 1975

This notice was issued alleging a violation of 30 CFR 77.401(3)(c) 6/ when the inspector observed a worker in the shop operating a grinding wheel without wearing a face shield or goggles. The worker was wearing ordinary eye glasses with safety lenses which did not cover or protect the peripheral area of the eyes. Goggles were readily accessible to the worker and the foreman was present in the shop but made no attempt to warn or caution the worker concerning the use of goggles. Mid-Continent contended that there was no violation because the worker was wearing eye glasses with safety lenses and the worker's failure to wear the goggles provided was negligence of the worker and not a violation of the regulation by Mid-Continent.

We agree with the judge that ordinary eye glasses with safety lenses do not provide as much protection for the peripheral area of the eyes as would face shields or goggles required by the regulation. Further, the foreman was present but made no attempt to cause the worker to wear his goggles.7/ The judge's finding of a violation under these facts is affirmed.

5/30 CFR 70.201 provides: "Each operator of a coal mine shall, as prescribed in this Part 70, take accurate samples of the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed."

6/30 CFR 77.401(3)(c) provides: "Face shields or goggles, in good condition shall be worn when operating a grinding wheel."

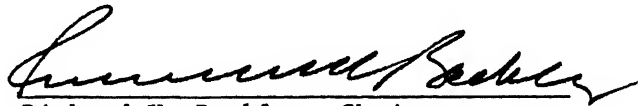
7/Mid-Continent's argument relying on North American Coal Corp., 3 IBMA 93 (1974) is rejected. See United States Steel Corp., 1 FMSHRC 1306, 1307 at n3 (Sept. 17, 1979).

The inspector issued a notice of violation of 30 CFR 77.1710(a) 8/ when he observed a worker in the shop using a cutting torch to cut holes in a 55 gallon drum without wearing protective goggles or a face shield. Protective goggles were hanging on one of the acetylene tanks connected to the torch. The worker's foreman was just a few feet away when the violation occurred but made no attempt to warn or cause the worker to use goggles.

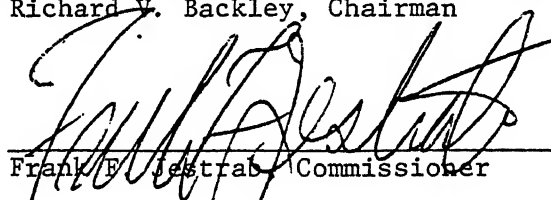
Mid-Continent contended that there was no violation because the worker was wearing eye glasses with safety lenses and failure to wear the readily available safety goggles was negligence of the worker and not a violation of the regulation by Mid-Continent.

For the same reasons accepted and stated in the notice immediately above, we find that ordinary eye glasses with safety lenses do not meet the requirement of face-shields or goggles of 30 CFR 77.1710(a). Further, the defense relying on North American Coal Corp., supra, is rejected for the reason stated in United States Steel Corp., supra, 1 FMSHRC at 1307, n3. The judge is affirmed.

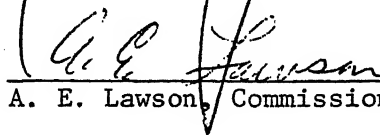
Accordingly, Notice No. 5-105 (2-RLM) June 5, 1975 is vacated. The decision of the administrative law judge in each remaining order and notice on appeal in these proceedings is affirmed.



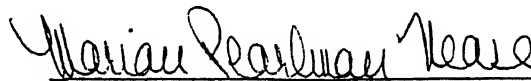
Richard V. Backley, Chairman



Frank F. Jastrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

8/30 CFR 77.1710(a) provides: "Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exists."

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NOVEMBER 19, 1981

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

on behalf of JOHNNY N. CHACON,

v.

PHELPS DODGE CORPORATION

Docket No. WEST 79-349-DM

This case involves section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979), and raises questions concerning the burdens of proof in discrimination cases previously enunciated in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds, No. 80-2600 (3d Cir. Oct. 30, 1981), and Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). 1/ For the reasons that follow, we hold that the judge erred in finding a violation and reverse his decision. 2/

The Secretary filed a discrimination complaint on behalf of Johnny Chacon on August 20, 1979, and a hearing was held on April 16, 1980. At the time of the hearing, Chacon had been employed as a locomotive operator at Phelps Dodge's Morenci Branch open pit copper mine for approximately 10 years. Chacon became a union safety committeeman in 1977, and vice-chairman of the union in January 1979. His duties as vice-chairman included handling grievances. Chacon customarily presented safety complaints of union members to management and apparently was the first union representative to take complaints to MSHA. Chacon testified that he drafted a letter complaining of a problem with signals that was signed by the local union chairman and sent to MSHA in December 1978. In addition, on January 31, 1979, Chacon delivered to Phelps Dodge's management a grievance signed by him and approximately 71 other union members complaining of unsafe and improper maintenance of cabooses. Chacon participated in safety grievance meetings concerning this complaint on February 7-8, 1979. Chacon sent a letter concerning the cabooses to MSHA on about February 21, 1979, after the allegedly retaliatory acts in this case.

1/ The Court of Appeals did not discuss the underlying discrimination analysis and burdens of proof that we formulated in our Pasula decision, but rather, on evidentiary grounds, held that the miner had been discharged for engaging in unprotected activity. Because the Court neither approved nor disapproved our Pasula analytical tests, its decision does not affect our application of these tests in the present case.

2/ The judge's decision is reported at 2 FMSHRC 1271 (1980).

On February 5, 1979, Chacon derailed a train on a bench track 3/ and the next day received a written warning over the incident for "excessive speed" under a "slow order." The normal maximum speed for trains on bench track at the mine is 15 m.p.h.; a "slow order" is a notice written on a chalk board indicating that conditions require slower speeds. No maximum speed was set in the slow orders involved in this case. The February 6th warning, which was placed in Chacon's employment file, stated that any repetition would subject Chacon to a "more severe penalty." Six days later, on February 12th, Chacon again derailed a train and was suspended from work without pay for three days for "excessive speed on slow order track...." Chacon filed grievances with respect to both the warning and the suspension; management rejected his complaints.

The judge found that Phelps Dodge illegally retaliated against Chacon for protected activity by placing the written warning in his employment file and then suspending him for three days without pay. The judge ordered Phelps Dodge to expunge the warning and any references to the suspension from Chacon's file and to pay him three days' wages with interest. The judge also assessed a civil penalty of \$2,500.

II.

We first analyze whether the judge properly found that the Secretary made out a prima facie case of a violation of section 105(c)(1). 4/ In Pasula, we held that a prima facie case is established:

... if a preponderance of the evidence proves (1) that [the miner] engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity.

2 FMSHRC at 2799.

3/ A bench is a ledge, or step, in the bank of an open pit mine. Along the Morenci pit benches, Phelps Dodge uses temporary, moveable track panel referred to as "bench track."

4/ The judge issued his decision before we decided Pasula. Adapting a discrimination test for the 1977 Mine Act from the D.C. Circuit's description in Phillips v. IBMOA, 500 F.2d 772, 779 (1974), cert. denied, 420 U.S. 938, of a prima facie case under the 1969 Coal Act, the judge described the elements of proof that he believed the Secretary or miner must meet: The miner has engaged in protected activity; adverse action has occurred; and the adverse action "was motivated in at least significant part" by the protected activity. 2 FMSHRC at 1281. This formulation differs from our test in Pasula in that we determined that a prima facie case requires only a showing that the adverse action was motivated "in any part" by protected activity. Although this is an important distinction, the judge found that the Secretary had satisfied a stricter standard. Accordingly, the showing required by Pasula was, in effect, satisfied as well in the judge's mind. The judge also countenanced the presentation of an affirmative defense. He stated that the operator may present legitimate reasons, or "justification," for the punitive action alleged to be retaliatory. Id. at 1283-84. This comports generally with the defense available to operators pursuant to our decisions in Pasula and Robinette, 2 FMSHRC at 2799-2800; 3 FMSHRC at 818 n. 20. In sum, because the judge applied an analysis that is a functional analogue of our Pasula test, we believed that a remand for application of the latter test would be pointless.

The first element of a prima facie case is a showing that protected activity occurred. The judge found that Chacon "as a representative of miners--not just [as] a miner-- ... filed and made complaints under the Act, including complaints notifying the operator of alleged dangers and safety and health problems and ..., as a union representative on behalf of other miners, made such reports both to the mine operator and the government agency charged with enforcing the Act." 2 FMSHRC at 1280. That Chacon was a safety committeeman and presented safety complaints to management is not disputed. Substantial evidence also supports the finding that he played an important role in making safety complaints to MSHA. There is no question that the complaints to MSHA were protected activity. Furthermore, Chacon's safety complaints to management were also protected activity. In relevant part, section 105(c)(1) broadly protects the "fil[ing] or ma[king] [of] a complaint under or related to [the] Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation" (emphasis added). Thus, we conclude that the first element was established.

The second element of a prima facie case is a showing that adverse action was motivated in any part by protected activity. Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. As the Eighth Circuit, for example, has analogously stated with regard to discrimination cases arising under the National Labor Relations Act:

It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965).

In the present case, the judge found discrimination on the basis of the following circumstantial indicia of discriminatory intent: knowledge of protected activities; hostility towards protected activity; coincidence in time between the protected activity and the adverse actions; and disparate treatment of Chacon. We examine each of these indicia below.

The operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case. Because subjective factors are involved, the operator's knowledge--like the overall question of motivation itself--can be proved by circumstantial evidence and reasonable inferences. Cf. NLRB v. Long Island Airport Limousine Serv., 468 F.2d 292, 295 (2d Cir. 1972). We agree with the judge that there is substantial direct and indirect evidence of Phelps Dodge's knowledge of Chacon's protected activity.

As the judge found (2 FMSHRC at 1279, 1280), Chacon customarily presented safety complaints to management as the union safety committeeman and, on January 31, 1979 (shortly before his warning and suspension), delivered to Phelps Dodge a safety grievance signed by him and 71 other miners. This protected activity obviously supplied knowledge of his leading role in this area and Phelps Dodge does not contend otherwise.

We also agree with the judge that Phelps Dodge knew of Chacon's complaints to MSHA. As the judge found, superintendent Olson revealed his awareness of Chacon's activity at a grievance meeting in December 1978, shortly after safety complaints were sent to MSHA. 2 FMSHRC at 1279. At the beginning of that safety grievance meeting, which was attended by Chacon and another representative of the union, Olson angrily objected to the sending of safety complaints to MSHA. Tr. 58-59, 173. Although Olson denied knowing who contacted MSHA, he expressed his disapproval to Chacon and it is reasonable to infer from Olson's testimony that his comments were directed toward Chacon. Tr. 168-169.

Hostility towards protected activity--sometimes referred to as "animus"--is another circumstantial factor pointing to discriminatory motivation. Cf. NLRB v. Superior Sales, Inc., 366 F.2d 229, 233 (8th Cir. 1966). The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries. We agree with the judge (2 FMSHRC at 1277, 1279, 1280) that Olson's angry remarks to Chacon about the MSHA complaints, discussed above, display a specific hostility towards Chacon's protected activity.

The judge also properly relied on coincidental timing as another indication of illegal motive. Cf. NLRB v. Long Island Airport Limousine Service, Corp., 468 F.2d at 295-296. Chacon received the warning on February 6th, within one and one-half months after MSHA was contacted. The suspension on February 12th occurred only four days after Chacon participated in safety grievance meetings resulting from a complaint signed by 72 employees.

We hold that the substantial evidence of protected activity, knowledge, specific hostility, and coincidental timing present here make out a prima facie case that the adverse actions against Chacon were motivated, at least in part, by discriminatory reasons. The most persuasive aspect of this evidence is Chacon's leading role in the protected activity; as the judge found (2 FMSHRC at 1279), "Chacon had created a change in the force with which safety complaints were being handled by the local union." The warning and suspension occurred after the "change in force." Adverse action under circumstances of suspicious timing taken against the employee who is the leading figure in protected activity casts doubt on the legality of the employer's motive since such conduct is the classic method of undermining protected activity. Cf. NLRB v. Fremont Mfg. Co., Inc., 558 F.2d 889, 891 (8th Cir. 1977). This is not to say that the preceding factors will always make out a prima facie case, but here we find them present in a combination adequate to support a reasonable inference of partially unlawful motivation.

In addition to the evidence discussed above, in finding a prima facie case the judge relied heavily upon what he regarded as Phelps Dodge's "disparate treatment" of Chacon. 2 FMSHRC at 1273-76, 1282. While, in general, disparate or inconsistent treatment is an indirect factor often indicative of discrimination (Cf. NLRB v. Melrose Processing Co., 351 F.2d at 698), we find that there is not substantial evidence of disparate treatment on this record.

The judge's disparate treatment finding rests on data concerning the frequency of derailments and of resulting discipline at Phelps Dodge. This data, provided in answers to interrogatories, shows that derailments were common occurrences: 1,082 derailments occurred in 1977; 1,164 in 1978; and 77 in the month of September 1979. In 1977, no warnings were given to engineers for derailments as a result of excessive speeds. In 1978, four warnings were given to engineers for excessive speed; three of the warnings do not indicate either speed prior to, or the extent of damage from, the derailment. In the first 9 months of 1979, Phelps Dodge's records show three warnings for excessive speed issued after Chacon's. Two warnings specified speeds of 15 and 20 m.p.h., respectively, and indicated damage "to track and locomotive" and "tore up 7 or 8 panels"; the third warning did not show speed or damage. The judge also noted that during 1976, 1977, 1978, and 1979 only one employee other than Chacon was suspended for operating at excessive speeds, and the speed and damage were not recorded. In that 4-year period, 6 locomotive engineers, including Chacon (see n. 7 below), were suspended for reasons other than excessive speed, but relating to operation. On the basis of the foregoing evidence, the judge concluded that Chacon was subjected to "disparate treatment."

Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter. The Secretary did not show either that other engineers similarly caused excessive speed derailments resulting in damage--Chacon's alleged misconduct--but escaped discipline, or that other engineers guilty of other equally or more grave offenses received less or no discipline. The fact that many derailments occurred does not by itself prove that they were caused by excessive speed or operational misconduct. We cannot accept the judge's implicit assumption (2 FMSHRC at 1282) based on the mere volume of derailments that significant numbers involving excessive speed or other operator error and serious damage occurred. On the contrary, the judge found elsewhere in his decision that:

Derailments are common occurrences at the Morenci Mine.... Locomotive engineers experience a derailment at the rate of approximately one per month. Derailments can occur at slow speed as well as high speed because of defects in the rails, the track generally, or the equipment. (Emphasis added).

2 FMSHRC at 1273-1274.

We emphasize that Phelps Dodge admitted at trial (Tr. 102-103, 185-187) that mere derailments with resultant damage, unless caused by operator error, would not ordinarily result in discipline. The raw data provided does not show how many derailments resulted from excessive speed or related factors; hence, from all that appears in the record,

derailments caused by operator error may well have been relatively rare occurrences. On the other hand, the record does show that in 1978 and the first nine months of 1979, seven other engineers received excessive speed warnings; between 1976 and 1979, one other engineer was suspended for an excessive speed derailment, and five were suspended for operational infractions, such as running red lights. There is no evidence that engineers who had excessive speed derailments causing serious damage, or who were involved in similar incidents, escaped discipline. 5/

In the foregoing context, Chacon's discipline is not facially anomalous. Hence, we cannot conclude that the data shows or supports the inference that Chacon's treatment was inconsistent with company practice. On the contrary, we think that the data does show that Chacon's discipline was facially consistent with company practice, a conclusion which pertains to the adequacy of Phelps Dodge's affirmative defense. Given the rawness of the data, we do not find this derailment evidence particularly persuasive for either party's case. 6/ As discussed above, however, we conclude that the Secretary demonstrated a prima facie case of a violation without the data and without a showing of disparate treatment. 7/

5/ After Phelps Dodge presented its defense, the Secretary offered the testimony of Michael Cranford in rebuttal. Cranford described two derailments, one before and one after the incidents in this case, that resulted in a great deal of damage, but no discipline to the engineers. No evidence was presented concerning either operational misconduct or the speed at which the locomotives were traveling. We do not think this evidence suffices to show disparate treatment.

6/ The rawness of the data was underscored by the Phelps Dodge witness who gathered it. Richard Boland, the director of personnel services, testified, for example, that he obtained the information on the number of persons disciplined from grievance records. He stated that others may have been disciplined, but the data he supplied in answers to interrogatories would not show this if the engineers involved did not file grievances. Tr. 189-191. He cited "sheer volume" as the reason why additional records were not examined. Tr. 190. The Secretary did not seek additional information or records either prior to the hearing, or when Boland testified, or at the conclusion of the hearing. Thus, the available data on "comparative" discipline is at least incomplete, and probably somewhat "skewed" in the Secretary's favor.

7/ We also disagree with the judge's somewhat confusing discussion of burdens of proof regarding the numerical data presented. (2 FMSHRC at 1282). The judge appears to suggest that the burden of proof was Phelps Dodge's. On the contrary, the Secretary raised the possibility of disparate treatment in his prima facie case and, accordingly, he had to shoulder the burden of showing it.

We also do not agree with the judge regarding two other inferences that he drew. The judge found that a supervisor's reference to Chacon as "your boy" on February 12th indicated "displeasure on the part of management with Chacon" and was evidence of discriminatory motive. 2 FMSHRC at 1281-1282. The description of the "your boy" incident came from superintendent Olson. He stated that shortly after the derailment, he encountered shift foreman Pounds who said, "Your boy done it again."

(footnote continued)

III.

As we stated in Pasula, Phelps Dodge may defend against the Secretary's prima facie case "by proving by a preponderance of all the evidence that, although part of [its] motive was unlawful, (1) [it] was also motivated by the miner's unprotected activities, and (2) that [it] would have taken adverse action against the miner in any event for the unprotected activities alone." 2 FMSHRC at 2799-2800; see Robinette, 3 FMSHRC at 818 n. 20. Phelps Dodge points to two factors in its defense.

First, Phelps Dodge asserts that its discipline of Chacon is consistent with company policy. As already discussed with regard to disparate treatment, there is evidence that other engineers were warned over excessive speeding incidents and others were suspended for serious operational misconduct. We also note that Chacon's discipline was not inconsistent with his past employment record. As detailed in the accompanying note, Chacon had some history of discipline both before and after he became a union safety committeeman. 8/ Hence, we cannot conclude that it was an unprecedented disciplining of a miner with an otherwise unblemished employment record.

Second, Phelps Dodge points to the seriousness of Chacon's two virtually consecutive derailments which it alleges were caused by excessive speed. A shift foreman indicated that damage and speed are considered when imposing discipline. Tr. 166. Track panels cost \$1,500 each. 2 FMSHRC at 1274; Tr. 104, 185. Chacon, himself, testified that three to four "rails" (which the witnesses apparently treated as synonymous with "panels" in their testimony) were torn up in the first derailment, and three or four more during re-railing. Tr. 66-67. Chacon testified that three or four rails were also "turned up" in the February 12th derailment. Tr. 75, 83. The shift foreman stated the

fn. 7/ cont.

Tr. 171, 177. Olson stated that he knew to whom Pounds referred because he had heard of the derailment on a mine radio in his office. Tr. 171. Pounds testified that he did not remember the conversation. Tr. 165. Both men indicated that anyone who did something wrong on the job might be referred to as "Olson's boy". Tr. 164, 177. In view of this testimony, we do not believe that the comment reasonably supports an inference of discriminatory hostility toward Chacon.

The judge also inferred that a disciplinary warning for excessive speed delivered to another engineer shortly after the initial warning to Chacon was "actual evidence of bad faith" and "smacks of action taken to bolster the disciplinary action taken against Chacon." 2 FMSHRC at 1282-1283. As Phelps Dodge points out, there was no evidence presented regarding that incident. Accordingly, this finding is speculative and we reject it.

8/ Chacon received a warning in December 1971, involving operation of his train; a warning on June 18, 1972, involving a failure to control his train and the derailing of a caboose; a disciplinary 3-day lay-off on September 26, 1973, for running a light; a 7-day disciplinary lay-off on December 22, 1973, involving an operating violation; a warning on October 14, 1975, for failing to control his train which resulted in a collision; a warning on March 14, 1977, for being AWOL; a warning on August 28, 1977, for not wearing a safety hat; a 3-day suspension on December 27, 1977, for AWOL; a warning on July 30, 1978, for an operating violation; a warning on January 8, 1979, for reading on the job; and another warning on January 8, 1979, for not wearing a safety hat and glasses.

damage in the second incident was "terrible" and approximately twelve panels were "completely demolished." Tr. 155. Another company witness described the track as "demolished", but did not indicate a number of rails or panels damaged. Tr. 108. In our opinion, the preponderance of the evidence shows severe damage. In short, there is no real dispute that Chacon's derailments caused several thousand dollars worth of damage, although no evidence was introduced concerning the total cost of his accidents or how it compared to damage caused in other accidents.

The more crucial question, however, is whether Chacon was traveling at "excessive" speeds under the slow orders and, therefore, was at fault when the incidents occurred. As we noted above, derailments with resultant damage are frequent occurrences and, unless operator misconduct were involved in some way, discipline would not ordinarily be imposed. Phelps Dodge bases its allegations of misconduct, *i.e.*, "excessive" speed, on both the damage at the time of derailment and speed tapes taken from Chacon's locomotives just after derailment. Several company witnesses testified that they could determine from damage alone whether an engineer's speed was excessive. Tr. 103, 138, 155. Assistant shift foreman Lines testified that on February 5, the track was "pretty well tore up" (Tr. 135) and that he believed Chacon had been travelling too fast. Tr. 136, 138. General mine foreman Brooks stated that he believed Chacon's speed on February 12 was greater than 11 or 12 m.p.h. "because the track was completely demolished." Tr. 108. Two witnesses testified that speeds above 10 m.p.h. are excessive under a slow order. Tr. 122-23, 162. A third stated that 5-10 m.p.h. is the proper speed under a slow order. Tr. 144. Phelps Dodge also uses a device to record on tape the locomotives' speedometer readings. The "speed tapes" are customarily checked after derailments and the supervisor initials the tape at the point where derailment occurred. 2 FMSHRC 1274; Tr. 135, 155. Copies of Chacon's speed tapes were introduced at the hearing and a company witness testified that they showed speeds of 16 m.p.h. on February 5, and 15 m.p.h. on February 12 just before the respective derailments. Tr. 121; Exh. R-4. Phelps Dodge's supervisory personnel consistently indicated at the hearing that they rely on these speed tape records and damage-based estimates of speed.

Although Chacon testified that no one had ever specifically told him what a slow order meant, Phelps Dodge's supervisors also consistently testified that the meaning of slow order is well known by their engineers. Tr. 127, 138, 153-54. In partial agreement with the judge, we conclude that the speed tapes and damage-based estimates are probably only roughly accurate. Nonetheless, as we explain below, we do not agree with the judge's rejection of this evidence. In our opinion, the judge improperly substituted his business judgment for that of Phelps Dodge by his virtual exoneration of Chacon's conduct in the two derailment incidents and by his consequent rejection of Phelps Dodge's entire defense as pretextual.

The judge rejected Phelps Dodge's claim that Chacon's speed was excessive. He found that because the locomotive speedometers regularly "bounce" or fluctuate between 5-15 m.p.h., the speedometers and speed tapes were "unreliable as ... precise indicator[s] of speed," and that the operating engineer is generally the best judge of a locomotive's speed and of what a "safe and proper speed is." 2 FMSHRC at 1273. He

treated Chacon's speed tapes as unreliable and credited Chacon's own subjective estimates that he was travelling between 5-10 m.p.h. just before the first derailment, and about 10 m.p.h. before the second. Id. at 1277-78. The judge found that derailment damage is "not particularly probative of ... speed [because] other factors could [contribute to the damage done]--including the weather, the conditions, the wetness, the rain, and the like." Id. Finally, the judge criticized Phelps Dodge for what he regarded as its faulty system of posting slow orders, investigating derailments, and imposing discipline over any derailments:

... If the Respondent wishes a forum or tribunal or a court to recognize that there is some maximum speed involved in the "slow order," then it should print or publish such a maximum speed. It should teach its engineers what it is. It should spell it out on the call board. It would then have the proof that it can come in and say, "Look this is what it is," but to come into a hearing and express an opinion, and there were different opinions even among Respondent's witnesses apparently as to what it meant, would seem to give it complete latitude to say anything it would want in a tribunal. If it wants to set a maximum, it should do it either by printing it or at least when a "slow order" is put up to specify what the maximum speed is. The reliability of the speed recorder would still be a problem from the standpoint of proof. So the affirmative defense that Respondent raised, in my opinion, was not established by probative evidence that I can recognize.

Id. at 1283.

We hold that the judge exceeded appropriate limits in examining Phelps Dodge's business practices. Of course, Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis and meets the first part of the Pasula affirmative defense test, then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's

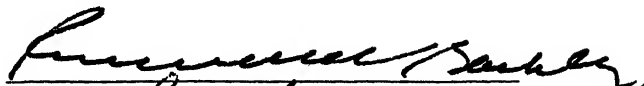
or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).


Contrary to the judge, we conclude that Phelps Dodge successfully defended by showing that it did have legitimate reason to regard Chacon's first derailment as a misstep warranting a warning, regardless of the ultimate truth of Chacon's and management's conflicting views on whether he was speeding. Such warnings had been issued before; there was credible reason, pursuant to Phelps Dodge's normal business practice, to infer excessive speed; and the damage caused was apparently serious. Once Chacon was warned over this first incident, the second derailment, within one week and causing apparently severe damage, represented the very occurrence warned against. With the second incident, there again was evidence of possible speeding, and, again, suspension was facially consistent with other discipline for operator misconduct. The fact that the first warning notified Chacon of the possibility of more severe discipline goes far, in our judgment, to show that Chacon would have been suspended if he had a second speeding derailment--much less one virtually on the heels of the first and causing severe damage. Most importantly, we believe that Phelps Dodge demonstrated that, in the exercise of its business and personnel judgment, it relies on speed tapes and supervisory opinions on damage and speed in determining whether to assess discipline. Even if this is "unjust" because the speed tapes and supervisor's evaluations are not always completely reliable, we cannot conclude that such reliance is, in effect, "impermissible" under the Mine Act. Thus, we conclude that Phelps Dodge established a legitimate statutory defense that it would have disciplined Chacon in any event for the unprotected activities alone. Treating the Secretary's allegations of disparate treatment as an attempt to refute this defense, we conclude, for the reasons already discussed, that the refutation fails. In short, we conclude that substantial evidence does not support the judge's rejection of Phelps Dodge's defense.


IV.

In sum, we agree with the judge that the Secretary proved a prima facie case of a violation by showing protected activity and circumstantial evidence from which a reasonable inference of at least partially illegal motive could properly be drawn. We also hold, in contrast with the judge, that Phelps Dodge successfully defended against the prima facie case.

Accordingly, the decision is reversed, the complaint dismissed, and the penalty assessed against Phelps Dodge vacated.


Richard V. Backley, Chairman


Frank B. Jestrab, Commissioner


Marian Pearlman Nease, Commissioner

Commissioner Lawson dissenting;

The judge below found and the majority herein have affirmed that a prima facie case has been established of a violation of section 105(c)(1) by Phelps Dodge. I concur, and the evidence in support of that determination is indeed substantial, well-documented, and undisputed. This case therefore stands in fortunate contrast to other discrimination claims, which have required for determination the weighing of the credibility of frequently sharply diverging testimony by parties with totally contradictory versions of the facts. As the majority states:

We hold that the substantial evidence of protected activity, knowledge, specific hostility, and coincidental timing present here make out a prima facie case that the adverse actions were motivated at least in part, by discriminatory reasons.

Slip op. 4.

Inexplicably, the majority then holds that Respondent... "prov[ed] by a preponderance of all the evidence that, although part of [its] motive was unlawful, (1) [it] was also motivated by the miner's unprotected activities and, (2) that [it] would have taken adverse action against the miner in any event for the unprotected activities alone.", in claimed reliance on Pasula and Robinette, supra. Slip op. 2.

As to motive,^{1/} the unchallenged finding of the judge below is that "the primary management figure engaged in the decision to issue the written warning on February 6 and the three-day suspension on February 12, 1979, was Mr. Joseph Roche, General Mine Foreman."... "it is clear that the decision to suspend Chacon was made by Mr. Roche." 2 FMSHRC at 1279-80.

Roche was not called as a witness in these proceedings, and his mental state or motivation, which is critical under the majority's rationale, is therefore not of record. Nor does any reason appear why this clearly vital witness, at the time of the hearing still an employee of Phelps Dodge, was not produced by the operator at the trial, whose burden it was to establish a permissible motive for the suspension meted out. The majority has therefore gone outside the record to speculate as to Roche's motive or motives, despite the lack of any evidence thereof.

As to whether Appellant would have taken adverse action against the miner for the unprotected activities alone, a review of the factual findings of the judge appears to be appropriate:

During the years 1976, 1977, 1978, and 1979, only one of Respondent's employees, aside from Johnny Chacon, was suspended from employment without pay for operating a locomotive at an excessive speed causing a derailment. Respondent's records indicate that one M. F. Naccarati was suspended for 3 days for violating the Code and that there was no record of the speed or damage.

2 FMSHRC at 1276

^{1/}Motive is defined as "something within a person (as need, idea, organic state, or emotion) that incites him to action... Webster's Third New Int'l Dictionary (Unabridged).

It appears that Chacon was the first, or from Respondent's standpoint, the second employee ever suspended for an excessive speed derailment. I find that the statistical evidence which I previously specified indicates that Chacon was treated in a disparate manner. The general burden of establishing by a preponderance of the evidence a case of discrimination is on the Applicant. However, the burden of proof is on Respondent as proponent of the rule that it urges in this case, that is that Chacon was warned and suspended for operating a locomotive at excessive speeds causing derailment. Thus, Respondent's argument that the Government has failed to show that there were other derailments where excessive damage was done and where the locomotive engineer was not punished in retaliation for safety reporting activities in my judgment has no merit if the Government has established otherwise a prima facie case. I would conclude that the burden would shift to Respondent to show that there were excessive speed derailments and that the locomotive engineer did receive a suspension. The Government has shown that such was not the case clearly. The records furnished by Respondent in answering the interrogatories show no such suspension other than the Naccaratí incident which is not sufficiently documented, in my judgment, to count. So, I conclude on the basis of the statistical information that the Government has established that Chacon was treated disparately.

2 FMSHRC at 1282 (Emphasis added)

The majority avers that the Secretary raised the possibility of disparate treatment in his prima facie case and accordingly, he had to shoulder the burden of proving it. Slip op. 6. Pasula, however, upon which the majority claims to rely, establishes no such test. Nor is disparity the central issue, despite the majority's focus. The determination to be made is whether this miner was discriminated against. All agree that he was. A showing that the discipline imposed was not disparate is perhaps some indication that the operator was merciful, not just, but does not without more negate a finding of discrimination. Since Respondent (Appellant) has contended that there were other excessive speed derailments, and the engineer[s] there involved were disciplined, the burden of going forward with or presenting facts showing this to be the case is properly--as the judge below held--that of Appellant.

The majority would require the Secretary to shoulder the burden of proving a negative, that is, that other derailments claimed to be due to excessive speed resulted in less or no discipline. Although the best, indeed the only quantifiable, evidence presented does just that, the information the majority demands is here, and will always be, in the control of the operator, not the Secretary, and any explanation, exculpatory evidence or justification for the clearly facially disparate discipline imposed on Chacon should have been offered by the operator. It was not, and what the majority terms the operator's "affirmative defense" consequently fails. Slip op. 6.

That evidence, and the record herein, reflects a railroad compared to which the fabled Penn Central appears to be a model of operational efficiency. In 1977, 1,082 derailments took place; in 1978, 1,164; and in 1979 (up until September), 786 (for an annual rate of 1,148). Of these extra-rail excursions, no warnings were given to Phelps-Dodge's engineers for any which took place in 1977, four warnings were given to engineers for "excessive" speed in 1978, 2/ in 1979 no warning for excessive speed was given for any derailment prior to the one here involved.3/

In summary, of 3,032 derailments recorded prior to Mr. Chacon's, in only seven instances were engineers warned for "excessive" speed, and only Chacon was penalized by imposition of a suspension for the claimed violation of this operator's so-called slow order. And, as is undisputed, mere derailments, even with resulting damage, would not ordinarily result in discipline, unless caused by the engineer's error. Nevertheless, it is asserted that "There is no evidence that engineers who had excessive speed derailments causing serious damage, or who were involved in similar incidents, escaped discipline." Slip op. 6. This begs the question of the nature of the discipline imposed, which is so clearly disparate as to need no embellishment.

In summary, the evidence established over 3,000 derailments with only one suspension for excessive speed, that of Chacon in this case. It is difficult to envision a stronger case of disparate or discriminatory treatment. In short, the discipline here imposed was clearly not facially consistent, it was rather facially inconsistent.

Moreover, no documentary evidence was presented, nor, it is undisputed, does such exist, defining either a "slow order", nor what is "excessive speed". There has never been any posting or written expression or publication by this operator defining these terms. The sole operator attempt to inform its engineers concerning regulating locomotive speed reflected in this record was the chalking of "slow order in effect" on the mine blackboard in this case, despite the--again unchallenged--fact that, as the judge below found, "slow orders" do sometimes specify maximum speeds. 2 FMSHRC at 1274.

Indeed, this so-called "slow order" hardly rises to the dignity of an admonition, much less an "order". An employer of this size and sophistication would not appear to lack the capacity to credibly define a slow order, and what constitutes a violation thereof. Nowhere in this record is there any evidence that Chacon had been advised on the day in question as to what, indeed, was a slow order, or what was a permissible speed for the train he was operating.

2/Three of these indicate neither the speed prior to, nor the extent of the damage caused, by the derailment.

3/Of these 1979 warnings issued after the instant derailment, two specified speeds of 15-20 m.p.h., respectively, and indicated damage "to tracks and locomotives" and "tore up seven or eight panels": the third showed neither speed nor damage.

Nevertheless, despite the absence of any written or published definition of "slow order", if there existed even an unwritten understanding thereof, the majority's rationale for finding a violation of that order would be supportable. But, as the judge below also found:

Under the Code of Safe Practice for Railroad Train Operations applicable to the Morenci Mine, Exhibit R-2, unless a so-called "slow order" is posted on a call board, located for purposes of this proceeding in a lineup shack, the maximum permissible speed on good track which is to be observed by locomotive engineers is 15 miles per hour for "bench tracks." I note that the Code also provides that "track conditions may dictate speeds slower than those listed above," which also is evidence that in the final analysis the subjective judgment of the locomotive engineer must determine what a safe and proper speed is....

There is no written instruction or provision in operators' manuals or in courses taught by either the Government or the operator or elsewhere or otherwise which express what a maximum speed is under a "slow order"....

Turning now to the incidents which resulted in the issuance of the warning and the suspension I find that on February 5, 1979, Chacon was operating his locomotive on the bench proceeding towards the dump when his train was derailed. Chacon was in the caboose which contained no speedometer. Chacon had not been told by management either in writing or orally what the maximum permissible speed was that he should do. There was, however, a "slow order" in effect and (I find) that Chacon was going no more than 10 miles per hour. I make this finding on the basis of the following reasons: Various witnesses for the Respondent have indicated that they can tell or should be able to tell how fast a locomotive is going within 2 or 3 miles per hour; that is, a locomotive engineer should be able to make such a judgment. On the other hand, Mr. Starr testified that he could estimate his speed above 5 to 7 miles per hour and that it is difficult at speeds above 5 miles per hour to determine exact speed. Mr. Chacon testified that he was going between 5 and 10 miles per hour and that he could tell he was not going 15 miles an hour based upon his experience. I conclude that Mr. Chacon, being the operator of the locomotive at the time, is in the best position to determine his speed....

2 FMSHRC at 1273, 1274, 1277

The majority's sua sponte adoption of the operator's defense that the extent of the damage incurred, despite the establishment of a prima facie case of discrimination, somehow rebuts the finding of a violation despite the operator's own disclaimer that it would not impose discipline on that basis, is also unsupported by the record. As the judge found:

I further find for similar reasons that gauging damage--and surveying damage done--is not particularly probative of the speed that a train is traveling in a given instance. There is testimony in this record with respect to factors which could change that--including the weather, the conditions, the wetness, the rain, and the like. The opinions given, likewise, are suspect for the reason that gauging speed on the basis of damage is not particularly susceptible to persuasive proof by the rendering of a mere general opinion. There was really little corroboration beyond the expression of such general opinions in this case. Certainly, these were not sufficient evidence to overwhelm the testimony of the person in the best position to gauge the speed, which in this case is the operator himself. I also find no reason to discredit the testimony of Mr. Chacon on this subject and on other subjects contained in his testimony. The occurrence of derailments is very frequent and can occur from many, many causes. To attribute the derailments to excessive speed in this instance would require a higher quality of proof than that presented by Respondent. 2 FMSHRC at 1277-78.

The majority's opinion, which concedes the fallibility of speed tapes (Slip op. 10) fails to define what constitutes a proper speed under a "slow order." Since the necessary predicate for the violation of a rule is obviously the existence thereof, and the undisputed record is as set forth I fail to perceive how Chacon can be legitimately disciplined for violating such. The operator's rule claimed to have been violated lacks both specificity and definition, so as to qualify as a restraint of whose existence an employee could have fair notice.

Again, the judge's opinion details the infirmity of the actual measurement of the speed:

I find that the needle of the speedometer fluctuates or "bounces" regularly between 5 and 15 miles per hour based upon the testimony of the locomotive operators who operate the same who testified in this hearing. I find that the speedometer and the speed recorder which records the speeds shown on the speedometer are unreliable as a precise indicator of the speed of the locomotive based upon the credible evidence in this proceeding. All witnesses who testified on the subject conceded that to some extent there was or there could be a variance between the speed shown on the speedometer and the actual speed being traveled.^{4/}

2 FMSHRC at 1273

The tape mechanism, in my judgment, is not sufficiently credible based upon the testimony in this hearing for me to rely on it. Were the speed-recording tape reliable, I would consider it to be the best evidence and to have overwhelmed the opinions and subjective judgment of the individuals. The testimony in this case with respect to speed has been all over the lot. I do not find it sufficiently accurate from the standpoint of Respondent to credit it.

2 FMSHRC at 1277

^{4/}In addition, following the February 12th derailment, repairs were made to the speedometer of that locomotive. 2 FMSHRC at 1279.

The majority, however, would hold that the judge has somehow exceeded "appropriate limits in examining Phelps Dodge's business practices." That excursion to me bears no relationship to the issues before us on this appeal. Much more to the point is the existence of employer hostility or animus toward an employee, necessarily strong evidence in determining discriminatory motivation. Here the majority agrees with the judge that the operator displayed a "specific hostility toward Chacon's protected activity." Slip op. 4.

This affirmation of the judge's findings of "obvious animosity" (2 FMSHRC 1284) was not disturbed by the majority. The logic of the majority's opinion would compel a holding that the "substantial evidence of protected activity, knowledge, specific hostility, and coincidental timing present here....", found to make out "a prima facie case that the adverse actions against Chacon were motivated, at least in part, by discriminatory reasons," (Slip op. 4) are to be readily discarded if the discipline imposed can be in some way found not to be disparate.

Henceforth, it would appear that the Secretary must examine all disciplinary actions taken by the operator and submit these to the judge who must then evaluate such for disparity of discipline. It would be impossible for a single miner to prove disparate treatment, if no basis for comparison is available. For the majority to have concluded that the suspension here was proper, it must have determined that only Chacon's derailment, of over 3,000 enumerated, resulted from improper train operation. That is manifestly impossible on this record. Animus is to me still the touchstone in determining motivation, and its existence here is unchallenged. The majority's approach would appear, however, to border on indeed requiring impermissible examination of an operator's "business practices."

In short, an operator is now apparently granted broad license to discipline an employee, motive notwithstanding. The moral of the story would appear to be that penalizing more than one miner is permissible under the Act, even discriminatorily, but a similar exercise of discipline against only one miner would apparently be impermissible. This makes no sense as a matter of law or logic.

I therefore dissent.



A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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November 24, 1981

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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Docket No. VA 80-67-M

v.

LONE STAR INDUSTRIES, INC.

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The administrative law judge concluded that Lone Star Industries, Inc., violated 30 CFR §56.9-41, a mandatory safety standard, and assessed a \$6,000 penalty. 1/ The major issue before us is whether the judge erred in his interpretation and application of section 56.9-41, which provides:

Only authorized persons shall be permitted to ride on trains or locomotives and they shall ride in a safe position.

On the narrow grounds indicated below, we affirm the judge's decision. 2/

I.

The essential facts are undisputed. The citation was issued following the investigation of a fatal train accident on August 10, 1979, at Lone Star's Jack Plant, a stone milling facility located near Petersburg, Virginia. The injury was suffered by a brakeman engaged in "dropping" railroad cars.

1/ The judge's decision is reported at 2 FMSHRC 3440 (1980).

2/ Chairman Collyer assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision of the case. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Chairman Collyer's assumption of office, and participation by Chairman Collyer would therefore not affect the outcome and would delay issuance of the decision. Accordingly, in the interest of efficient decision-making, Chairman Collyer elects not to participate in this case.

Former Commissioner Nease participated in considering this case and voted to affirm the judge's decision, but resigned from the Commission before the decision was ready for signature.

"Car dropping" is the movement of railroad cars down grades for various loading and haulage tasks. At the Jack Plant, railroad hopper cars are loaded by Lone Star employees from bins and then moved down a .6% railroad grade to a storage yard. At the yard, the loaded cars are either parked or coupled with other parked cars prior to being pulled away by a locomotive. To start the cars down the grade, a dump truck or a bulldozer with rubber tires gives the cars a push. A brakeman, or "car dropper," rides on the cars and, by operating a manual brake, is responsible for controlling car speed, stopping the cars, and coupling safely.

The brake and brake platform are located on one end of a car. The brakeman applies or releases the brake by turning a wheel while standing on the brake platform. No facility exists at the Jack Plant to position the cars so that the brake platform end of each car uniformly faces in one direction. As a result, the brake platform may be on the front of one car and on the rear of the adjacent car. Prior to the accident, Jack Plant brakemen frequently rode in the front of the lead car. Before the cars to be dropped are pushed, the brakeman is supposed to make sure that the coupling device (called the "drawhead") on the lead car is open so that the dropped cars can couple properly with parked cars in the storage yard.

Once the pushing vehicle starts the cars moving, the driver of that vehicle drives along a road that parallels the track and affords an unobstructed view of one side of the tracks. The brakeman observes the tracks in order to adjust the speed of the cars if he notices an obstruction or is notified of one by the driver of the pushing vehicle. When the moving cars reach the storage area, the lead car couples with any parked cars.

On the day of the accident, a broken water pump prevented the loading of cars at the normal bin loading area. Four coupled hopper cars, only two of which had been loaded, were parked in the bin area when the pump broke. All four were pushed back up the track by a bulldozer to a stockpile loading ramp, an alternate loading site. The car against which the bulldozer was pushing was the one that would be the lead car when the cars were dropped to the storage yard. James Mays, the bulldozer operator, testified that the lead car's drawhead was in the open position when he began pushing the four cars to the alternate loading site. 2 FMSHRC at 3441; Tr. 160. Mays also testified that the bulldozer's blade was pushing directly against this drawhead, and his testimony reflects that the initial impact of that operation may well have closed the drawhead, an occurrence that had happened before "over the years of pushing rail cars." Tr. 161-163.

Once the two empty cars in the group of four had been loaded, brakeman James Brown stationed himself on the front brake platform of the lead car in the group to begin the drop. Brown signaled Mays to start pushing the four cars back down the grade. Apparently, neither Brown nor Mays checked to determine whether the front drawhead was open. The four loaded cars weighed about 338 tons. After the initial push, Mays drove the bulldozer alongside and past the four dropping cars to the site where the cars were to couple with thirteen parked cars. He observed the fatal accident that followed.

Just prior to coupling between the dropped and parked cars, Mays noticed that the drawhead on Brown's car, which was to couple with the open drawhead on the rear of the thirteenth parked car, was closed. The closed drawhead bypassed the open drawhead, causing the front car of the moving four cars to collide with the rear of the parked car. The force of the impact was of such magnitude that the thirteen parked cars were driven forward some 13 feet, the four dropped cars rebounded approximately eight feet, the wheels of the lead dropped car derailed, and the brake wheel on the lead car made an imprint on the rear of the parked car. When the front of the lead car hit the parked car, Brown was crushed between the two cars.

Prior to the accident, the Jack Plant had a policy requiring car droppers to wear safety belts while riding cars, but did not have any other written safety rules pertaining to car dropping. The record does not show that the plant had ever established a policy regarding a safe speed for car dropping. ^{3/} After Brown's death and the resultant citation, the Jack Plant adopted written car dropping safety rules prohibiting front end riding, riding while only one car is being dropped, and the dropping of more than three loaded cars at any time. 2 FMSHRC at 3445, 3446; Res. Exh. I.

The judge concluded that the front brake platform of the lead dropped car was an unsafe position for the brakeman to have occupied under the circumstances and, therefore, his riding in that position violated section 56.9-41. 2 FMSHRC at 3447-52. The judge found that if a possibility of front end collision exists during car dropping, riding the front brake platform may present the potentially fatal hazard of being crushed between the colliding cars. Id. at 3445, 3450. In determining that Brown rode in an unsafe position while car dropping, the judge focused on three factors.

First, the judge found that there was a history at the Jack Plant of miscoupling collisions caused by closed drawheads. 2 FMSHRC at 3443, 3449-50. He observed that cars being dropped at the plant "don't always couple" with parked cars and "car droppers had been careless about making certain that the drawheads were open at the time the cars were started on their journey to the loaded car storage area." Id. at 3450. Second, the judge noted that, although dropping cars had the right of way, Lone Star itself "emphasized the fact that trucks make 1,200 trips per day across the railroad tracks used for dropping cars." Id. The judge reasoned:

^{3/} The Jack Plant's sole rule regarding car dropping--requiring the wearing of safety belts--was one of 42 basic safety rules in effect in Lone Star's Chesapeake Division. In contrast, at the time of Brown's death, Lone Star's separate South Atlantic Division, which did not include the Jack Plant, had several written rules addressing safe position and manner of operation during car dropping. One such rule provided, "[u]nless absolutely necessary, never ride leading car down grade end[;] [r]ide between the cars or the trailing end." Another provided that "[a]ny time three or more cars are dropped down the track there should be two people braking the cars." 2 FMSHRC at 3444; Sec'y Exh. 4.

If [a vehicle] does get on the tracks and the car dropper should be unsuccessful in stopping the cars being dropped at a time when [he] is riding on the front car, [he] runs the risk of being crushed against [the] vehicle which may stop on the tracks.

Id. Third, the judge found that groups of loaded cars being dropped are extremely heavy and difficult to stop, thus increasing the risk of collision:

The empty weight of each [hopper] car is 70 tons and its loaded weight is about 84-1/2 tons. ... After [groups of loaded] cars ... start their journey, they can be stopped or slowed down only by application of a single manual brake on one of the ... cars. ... The operator of the Jack Plant has been dropping cars for 20 years and knows how much they weigh and how hard they are to slow down or stop even when they are moving at a low rate of speed.

Id. at 3449.

The judge concluded that the uncontroverted facts of the accident illustrated the dangerous interplay of these risks. He found that because Brown was dropping four loaded cars "with 338 tons of weight riding behind him," he would clearly find it difficult to stop or slow down the cars and risked a heavy impact crash if a collision danger arose from any source. 2 FMSHRC at 3449. In the judge's view, a foreseeable collision risk was present: not untypically, the lead drawhead was closed; the dropped cars attained significant momentum; upon contact with the parked cars, the closed drawhead caused miscoupling; and the combined weights of the thirteen parked cars and 4 moving cars generated a huge force of impact which exposed the front-riding Brown to the hazard of crushing. Id. at 3441-43, 3449-50.

II.

This case presents two major liability issues: first, what is the proper interpretation of section 56.9-41, and second, applying this construction to the facts, did a violation occur? At the outset, we emphasize the following bounds to our decision.

We reject the broad language--essentially in the form of dicta--in the judge's decision suggesting that front end riding while car dropping is per se unsafe. Such a sweeping proscription is not supported by the limited record in this case and necessarily involves safety and industrial ramifications best addressed in the formal rulemaking context.

Further, we agree with Lone Star that the test of whether this standard was violated cannot be made to turn on whether a fatal car dropping accident occurred. While an accident may sometimes shed light on an unsafe practice, it does not, by its mere occurrence alone, prove a violation of any given standard. Plainly, the reasons for an accident may have nothing to do with the substance of the standard allegedly violated. Therefore, our analysis largely ignores Brown's death; our

inquiry is only whether he was riding in an unsafe position when he started his August 10 car dropping journey. We turn to the meaning of section 56.9-41.

The cited standard, section 56.9-41--like the identical regulations applicable to metal and non-metallic mines, 30 CFR §§55.9-41 and 57.9-41--applies to train riding in general, a subject which includes car dropping in particular. Unlike the surface coal regulation that addresses car dropping specifically, 4/ section 56.9-41 focuses on only one aspect of safe train riding: safe position. Section 56.9-41 is the kind of standard made simple and brief in order to be broadly adaptable to myriad circumstances. The relevant variables affecting safe position are numerous, may differ from plant to plant, and may change from day to day in any particular operation. Accordingly, a broad and flexible standard is not misplaced in theory.

We therefore agree with the Secretary and Lone Star that section 56.9-41, as written, requires a "situational" approach to determining safe position. To quote Lone Star:

The mandatory standard, 30 CFR 56.9-41, does not, by its terms, prohibit or mandate riding a given rail car in a particular position, or on any particular rail car of a group of rail cars. Rather, in order to comply with the standard, an operator must determine what position is "safe". We submit, therefore, that the standard contemplates that what may be a safe position will vary depending on the context in which it is applied.

Br. 6. See also Secretary's Br. at 6. This interpretation renders the standard similar to the familiar and well established driving rule that a vehicle must always be operated at a speed safe for the conditions of the road at any given time. Speed and position are different concerns, but in both instances safety is measured in terms of the variable surrounding circumstances.

Although we conclude that section 56.9-41, as written, lends itself to reasonable construction and application under the circumstances of this case, we also conclude that the Secretary can and should provide more specific guidance than he has on the subject of safe car dropping. We urge the Secretary at least to publish in the Federal Register interpretive guidelines identifying and discussing variables relevant to safe position during car dropping and the common dangers to be avoided during dropping. Moreover, as section 77.1607(v) shows (n. 4 below), safe

4/ 30 CFR §§77.1607(v)-(aa) apply to car dropping. Section 77.1607(v) is most relevant to the present case and provides:

Railroad cars shall be kept under control at all times by the car dropper. Cars shall be dropped at a safe rate and in a manner that will insure that the car dropper maintains a safe position while working and traveling around the cars.

This regulation identifies four aspects of safe car dropping: keeping the cars under control; dropping at a safe rate of speed; dropping in a safe manner; and maintaining safe position.

position is not the only safety concern during car dropping. Keeping the cars under control and dropping at a safe rate of speed, to name two obvious factors, are equally important. We therefore also urge the Secretary either to rewrite the "9-41 series" or adopt supplemental regulations in order to identify the other major aspects of safe car dropping in addition to safe position.

Turning to the specific issues in this case, our interpretation distills the liability problem into a question of whether, under the circumstances present at the Jack Plant on August 10, was the lead front brake platform an unsafe position for Brown to have occupied? 5/

III.

We first consider whether it can ever be said that the front end brake platform is an unsafe position for car droppers. As we have already suggested, car dropping does not lend itself to per se safety rules: what is safe at one time or place may be unsafe at another. However, we affirm the judge insofar as he held that front end riding may be unsafe. The common sense of this view is obvious: given the enormous weights of loaded railroad cars, a serious collision is likely to be fatal to a dropper riding in the exposed front position. Moreover, Lone Star has presented no argument inconsistent with this approach. This principle, however, has reasonable limits. For example, where the collision danger is remote, such riding may be safe. In short, under this approach, the safety of front end riding appropriately depends on the relevant variables.

The essence of the judge's decision is a determination that on August 10 the front brake platform was an unsafe position for Brown because of the unique configuration of human and technological variables affecting safe riding position at the Jack Plant. The judge expressly focused on three conditions affecting safe position, and his decision implies a fourth.

First, he found that at the Jack Plant there was a history of carelessness in keeping drawheads open during dropping, and that as a result miscouplings and "bouncing-back" collisions were fairly common occurrences. The facts of this case appear to illustrate this carelessness. As noted above, the lead drawhead may well have been closed by the pushing vehicle during the initial push back up the track to the alternate loading site, a not uncommon occurrence when a drawhead was directly pushed. Despite that possibility, it appears that prior to the drop, no one checked to see whether, in fact, the drawhead had been closed during the initial push. Lone Star does not deny this history of carelessness and, indeed, concedes that the "vagaries of employee conduct" may be taken into account in determining whether riding in a given position is safe. Br. 11. We agree with Lone Star that human performance factors are as relevant to safety analysis as technological ones. On this point, we believe the judge was correct insofar as he found that this "human factor" created at least some risk of front end collision through miscoupling.

5/ There is no dispute in this case that Brown was an "authorized person" within the meaning of section 56.9-41 (2 FMSHRC at 3447) and that normal brake platforms are safe positions in general.

Second, the judge found that there were many vehicular crossings of the dropping tracks--as many as 1,200 per day. Lone Star did not deny this fact, but rather emphasized it before the judge (2 FMSHRC at 3450) in support of its argument, analyzed below, that front end riding is safer because it affords the best view of the tracks ahead of the cars. We also agree with the judge that this heavy traffic created another risk of front end collision. The presence of this risk is borne out by the uncontradicted testimony of Mays (who frequently was a dropper) that cars being dropped had "occasionally ... come in contact with vehicles crossing the tracks." Tr. 168.

Third, the judge found that the railroad cars were heavy and difficult to stop, and that Brown was riding with a huge load behind him--676,000 pounds of moving weight. We do not interpret this finding as meaning that Lone Star's cars were extraordinarily difficult to stop, and, indeed, there is no evidence to that effect in the record. We think the judge's decision merely means that given the factor of reaction time and the physical laws of momentum and inertia, some time and distance must be expended before these massive weights can be brought to a halt. We do not believe that this factor alone can support the judge's conclusion. Rather, we view it as a subsidiary consideration adding to the risk largely created by the other factors.

Fourth, implied in the judge's findings is the additional consideration that, so far as the record discloses, Lone Star had no formal or written policy regarding safe speed for dropping.

Considering all of the above factors together, we think that the judge's conclusion that section 56.9-41 was violated is reasonable and consistent with the evidence. While dropping a heavy group of cars, Brown faced a risk of high impact collision either from a miscoupling accident or an unsafe vehicular crossing. In this view of the case, Lone Star's 20-year history of apparently fatality-free front end riding was fortunate. The risks had been there for some time, and on August 10, luck ran out because a number of the worst hazards coincided. Further, we agree with the judge (2 FMSHRC at 3450, 3452) that these risks were not obscure or unique to Brown's drop. As we have already noted, there had already been miscoupling and vehicular crossing collisions. Hence, this is not a case where, from all that appeared, front end riding was relatively safe and was judged unsafe after the fact merely because something unexpectedly went wrong on one drop. In short, we conclude that safe position depends on the circumstances and that the circumstances present in this case at the Jack Plant rendered front end riding unsafe.

Lone Star's several objections to the judge's finding of liability lack sufficient weight to require reversal. Lone Star argues that the judge improperly ignored uncontroverted evidence of the following variables affecting safe riding position at the Jack Plant: the grade of the tracks was virtually level; the tracks were straight and in good condition; the brakemen were experienced; the brakes were of good quality; the twenty-year history of car-dropping at the Jack Plant did not indicate a risk of the accident of the type involved in this case; training programs at the Jack Plant were more stringent than federal requirements; and the

droppers wore safety belts. Lone Star concludes that "these factors supported the practice of car droppers riding the front of the lead rail car." Br. 8. We agree with Lone Star that these are relevant variables generally affecting safe position and we think that the judge's decision, both expressly and implicitly, recognized their presence at the Jack Plant. However, the crux of the case is the additional presence of the factors discussed above, i.e., coupling problems, extensive vehicular crossings, the time and distance required to stop heavy moving cars, and the absence of a formal policy regarding safe dropping speed.

Before the judge, Lone Star also contended that front end riding affords droppers probably the best view of the tracks ahead of the cars and that, therefore, even if some collision risks are present, they are best avoided by positioning the dropper where he can see them best and take preventive action. 2 FMSHRC at 3450. The judge rejected this argument by pointing to the difficulty of stopping the cars. Id. We do not entirely agree either with the judge or with Lone Star.

We agree with Lone Star insofar as it suggests that front end riding may sometimes be safe because of the enhanced view it affords, and our decision so recognizes. Nevertheless, if due to other variables, there is an unusual risk of front end collision and some compensating means of providing safe viewing, it is only prudent to avoid the risk by stationing the dropper elsewhere. The fatal flaw in Lone Star's argument is its failure to argue away the risk of front end collision generated by the miscoupling problems and heavy crossing traffic at the Jack Plant. As the judge found (2 FMSHRC at 3446, 3450), a dropper riding in the rear can view one side of the tracks while the pusher vehicle driver views the other. While this procedure is somewhat cumbersome, the judge found that Lone Star's adoption of it after the accident had proved feasible and safe. Id. at 3446. Lone Star does not argue otherwise.

Lone Star also argues that the "real" cause of Brown's accident was his negligence in failing to ensure that the coupling was open and in dropping the cars at an excessive speed. We do not doubt that Brown's actions contributed to the risks present on August 10. However, there was a history of miscoupling problems and resultant collisions at the Jack Plant, and the record does not show that Lone Star had established any formal policies regarding safe dropping speed. These latter factors were general risks present when Brown started his drop. In our view, his handling of the cars did not suddenly or anomalously create new risks or disclose unsuspected safety variables. Rather, his handling of the cars merely illustrated the existence and consequences of the risks already present. 6/

6/ At the hearing, Lone Star partially relied on an internal legal memorandum prepared by the Secretary's Solicitor's Office for MSHA (2 FMSHRC at 3445, 3451; Res. Exh. A), and attached a copy of the memo to its petition for review. The memo discusses the surface coal regulation on car dropping (30 CFR §77.1607(v)(see n. 4 above)), and includes the opinion that the "flexibility of the standard allows MSHA to exercise judgment in determining what is a 'safe' position for car droppers." Res. Exh. A, p. 1. The memo expresses the view that, depending on particular circumstances, front end riding may be unsafe (id.), and

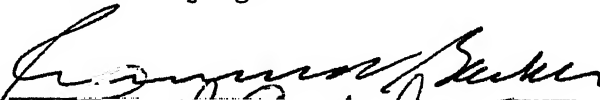

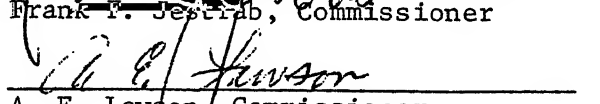
footnote 6 cont'd

In sum, we think Lone Star fails to rebut the judge's finding that Brown was riding in an unsafe position given the circumstances at the Jack Plant. Therefore, the judge's liability finding, narrowly construed, is affirmed.

Finally, the judge assessed a \$6,000 penalty largely on the basis of the degree of Lone Star's negligence and the gravity of the violation. 2 FMSHRC at 3453-54. The judge focused on what he regarded as Lone Star's negligent failure to promulgate written safety rules pertaining to safe car dropping. Id. The judge also noted Lone Star's good faith compliance and its "safety-minded" record in other respects. Id. at 3453. On review, Lone Star raises only a narrow penalty issue: the propriety of the judge's finding that it was negligent in not having written rules on car dropping.

We agree with the judge that Lone Star's failure to control more effectively such underlying variables as safe drawhead opening, coupling procedure, and vehicular crossing of the tracks, is evidence of negligence, although we do not believe such control necessarily had to be effected through written rules. The judge's penalty assessment is based on the evidence and reflects correct consideration of the penalty criteria set forth in section 110 of the Mine Act. The penalty is appropriate under the circumstances of the case and will not be disturbed. See Shamrock Coal Co., 1 FMSHRC 469 (1979).

For the foregoing reasons, we affirm the judge's decision.


Richard V. Backley, Chairman

Frank P. Jettab, Commissioner

A. E. Lawson, Commissioner

fn. 6 cont'd

recommends that if MSHA determines that front end riding is per se unsafe, or wishes to find it unsafe "on the basis of individual circumstances," it should first apprise industry of this viewpoint to "allow an opportunity for compliance." Id. at 2. The judge concluded that his decision was entirely consistent with the memo's opinion that front end riding may be unsafe, "depending on the circumstances involved in a given situation." 2 FMSHRC at 3451. We do not think that the memo injects any major liability issue into this case on review. Lone Star now chiefly cites it for the proposition that section 56.9-41 requires a situational analysis to determine whether any particular riding position is unsafe--an interpretation with which we agree, as discussed above. We also think that although the Secretary should provide further guidance on safe car dropping in the future, the situational risks at the Jack Plant were highly foreseeable and Lone Star should have prohibited front end riding until they were removed.

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 2 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	
)	
Petitioner,	)	CIVIL PENALTY PROCEEDING
)	
v.	)	DOCKET NO. DENV 79-569-PM
)	
SAN MIGUEL COUNTY,	)	A/C No. 05-03169-05002 V
)	
Respondent.)	MINE: San Miguel County
)	Screening Plant
)	

Appearances:

James H. Barkley, Esq.
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For the Petitioner

John Horn, Esq.
County Attorney
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P.O. Box 482
Telluride, Colorado 81435
For the Respondent.

Before: Judge Virgil E. Vail

DECISION

STATEMENT OF THE CASE

The above captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) [hereinafter referred to as "the Act"].

Pursuant to notice, a hearing was held on March 10, 1981 at Grand Junction, Colorado.

STIPULATIONS

At the commencement of the hearing, the parties offered the following stipulations:

1. Respondent admits the violation as alleged in Citation no. 325901.^{1/}

2. Respondent admits that it is the operator of the mine located at Sliprock, Colorado, the location where Citation no. 325901 was issued.

3. The Administrative Law Judge has jurisdiction of this case.

ISSUE

The only issue left to be determined was what penalty should be assessed for the violation of mandatory safety standard § 56.14-1.

PENALTY ASSESSMENT

The parties presented testimony relating to the six criteria as set forth in 30 U.S.C. § 815 for determining the appropriate amount of the penalty.

The evidence showed that Rosendo Trujillo, a federal mine inspector, issued Citation no. 325901 on June 29, 1978. He cited the respondent for failing to have the pinch point on a drive chain guarded. (Tr. 6). The drive chain was approximately three feet long and a half to two feet from the ground. (Tr. 6 and 9). Mr. Trujillo issued the citation based on his belief that an employee could get caught and pulled into the chain, thereby losing an arm or leg.

Respondent presented the testimony of their road foreman, Clifford Geisinger, who had accompanied Mr. Trujillo during the inspection. Mr. Geisinger testified that it would be difficult for anyone to get caught in the pinch point. He based his belief on the fact that the bin protrudes out at an angle above the chain. Because of this, a person would have to crouch or bend over to get close to the chain. (Tr. 10). He stated that in the eighteen years that he had worked with the machine there had never been an injury and the pinch point had never been guarded. (Tr. 10).

The respondent has no prior history of any violations. Also, I find that respondent's negligence was only slight. However, the fact that there had been no prior injuries and that the guard would be inconvenient, since it has to be removed periodically for cleaning purposes, are not mitigating circumstances.


Respondent did not demonstrate good faith in abating the citation. Mr. Geisinger told the inspector he would not put a screen on until he had orders to do so. The same day the citation was issued, Mr. Geisinger spoke with the Commissioners and was told to keep running the machine without the guard. (Tr. 11).

^{1/} Citation 325901 provided, in part that, "The chain drive powering the pan feeder by the tail pulley was not guarded ..."

The penalty proposed by MSHA was \$1,000.00. At the hearing, counsel for the petitioner stated that he thought this was in error. Counsel stated that he felt that the \$1,000.00 penalty was meant to apply to Citation no. 325052, which was issued for failure to abate. Citation no. 325052 was not the subject of the hearing.

Based on the testimony of the witnesses and counsels' comments I approved a penalty in the amount of \$100.00.

If the respondent has not already done so, the \$100.00 should be paid within forty days from the date of this decision.



Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 3 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 81-111
Petitioner	:	A.O. No. 36-03425-03069
v.	:	
	:	Maple Creek No. 2
UNITED STATES STEEL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: David T. Bush, Attorney, Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the petitioner;
Louise Q. Symons, Esquire, Pittsburgh, Pennsylvania,
for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceeding and a hearing was held on September 24, 1981, in Pittsburgh, Pennsylvania, and the parties appeared and participated therein. The parties waived the filing of posthearing proposed findings and conclusions, but were afforded the opportunity to make arguments on the record and those have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.
4. 30 C.F.R. § 75.1403 provides as follows:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Section 75.1403-1 provides:

(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the sections in the § 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

Stipulations

The parties stipulated to the following:

1. The respondent owns and operates the subject coal mine.

2. The inspector who issued the citations in this case was acting in his official capacity as a designated authorized representative of the Secretary of Labor.

3. Respondent is subject to the Act, and I have jurisdiction to hear and decide the case.

4. The citations which were issued in this case were properly served on an agent of the respondent, and copies of the citations issued may be admitted in evidence.

5. The penalty assessments in this case will not adversely affect the respondent's ability to remain in business.

6. Annual mine production at the subject mine for the year in question was 965,508 tons, and respondent's overall mine production for the same period of time was 15,849,000 tons.

7. The conditions cited in the citations were timely abated by the respondent in good faith.

8. A computer printout showing the previous history of violations for the subject mine was admitted without objection (Exh. G-3).

DISCUSSION

In this case, Safeguard Notice No. 1 CBC was issued on July 26, 1973, pursuant to section 75.1403, and it provides in pertinent part as follows (Exh. G-2):

The No. 18 haulage locomotive was being operated in the 5 Flat haulage track in 5 Flat 50 room section and was not equipped with a lifting jack and bar. All track locomotives operated in this mine shall be equipped with a suitable lifting jack and bar.

Section 104(a) Citation No. 845403, December 9, 1980, cites a violation of 30 C.F.R. § 75.1403, and the condition or practice cited is described as follows:

The No. 8 locomotive being operated by Tim Jansante in the 8 flat room section I-D 011 was not provided with a suitable lifting jack. The No. 8, 13-ton locomotive is used to pull coal from this section. Foreman in charge Ron Franczky. Notice to provide safeguard 1 CBC 7/26/73.

Safeguard Notice No. 1 RCM was issued on April 26, 1974, pursuant to section 75.1403, and it provides in pertinent part as follows (Exh. G-5):

The sanding devices installed on no. 7 self-propelled mantrip car were in-operative and three (3) sanding devices

were (empty) not provided with sand. All haulage equipment equipped with sanding devices shall be maintained operative, and provided with sand.

Section 104(a) Citation No. 845404, December 9, 1980, cites a violation of of 30 C.F.R. § 75.1403, and the condition or practice cited is described as follows:

Two of the four sanding devices provided on the No. 8 18 ton locomotive being operated in the 8 Flat 5 rm. 011 were inoperative. This locomotive was being operated by Tim Jansante and is used to pull coal from this section. Foreman in charge Ron Franczky. Notice to provide safeguard 1 R.C.M. 4/26/74.

Petitioner's Testimony and Evidence

MSHA inspector Francis E. Wehr testified as to his background and experience and he confirmed that he inspected the mine in question on December 9, 1980. He also confirmed the fact that he issued a citation pursuant to section 75.1403, after finding that the No. 8 locomotive was not equipped with a suitable lifting jack, and that it was required to have such a jack in light of a previous safeguard notice issued at the mine. The previous safeguard was issued on July 23, 1973, and it required that all mine locomotives be provided with such jacks. The locomotive which he cited did not have such a jack when he observed it (Tr. 10-16).

Mr. Wehr testified that the purpose of the safety jack was to assist in placing a locomotive back on the track in the event of a derailment. When he inquired of the locomotive operator as to why the jack was missing, the operator replied that he did not know and he commenced looking for one. The operator eventually found a jack lying against the coal rib some 50 feet from where the locomotive was parked (Tr. 16-19).

Mr. Wehr confirmed that he also issued a second citation after finding that two of the four locomotive sanding devices were inoperative, and that this condition also constituted a violation of section 75.1403 because a previous safeguard notice had been issued requiring such devices to be maintained in proper working order. He determined that the sanding devices in question were inoperative by asking the locomotive operator to activate them, and when he did, two of the four would not disperse sand on the track. Mr. Wehr also indicated that he also activated the sanding device levers, but that no sand would disperse on the tracks. Abatement was achieved by making an adjustment to the levers, and upon testing the levers after the adjustment was made, sand was dispersed on the tracks and he terminated the citation (Tr. 19-26).

Mr. Wehr testified that when he spoke with Locomotive Operator Jansante and asked him whether he had a jack, Mr. Jansante indicated that he had no knowledge as to whether he did or not. Since Mr. Jansante had no knowledge

as to whether he had a jack on the locomotive, Mr. Wehr believed it was reasonable to infer that he probably would have operated the locomotive without the jack (Tr. 48-49). A jack was subsequently found within 5 minutes or so, and it was located some 50 feet from the locomotive (Tr. 49). As for the sanding citation, he conceded that the sanders in question were filled with sand, and that he issued the citation because no sand was dispersed when the levers were initially activated (Tr. 50).

On cross-examination, Inspector Wehr testified that he first came upon the locomotive underground at approximately 10 a.m., and that he had first proceeded to the face area before returning to the area where the locomotive was parked. He could not recall passing the locomotive on his initial way to the face. The locomotive operator was in the area, but he could not recall going to the dinner hole to summon him, and he could not recall whether road work was going on or whether the track rails in front of the locomotive were jacked up. He also stated that he made no particular effort to determine whether the locomotive had been used the day of the inspection, but believed that it had been moved to facilitate coal loading. He did not ask the operator whether it had been moved, and he could recall no road work going on between the location of the locomotive and the coal-loading point. Although Mr. Wehr stated that he was aware that company policy required a locomotive operator to check the sanders and the presence of a jack before moving a locomotive, he did not ask the operator whether this had been done. He conceded that company policy dictated that this be done before a locomotive is moved (Tr. 26-29).

Mr. Wehr stated that at the time he viewed the locomotive, coal production had started at the face area, and he did not believe it unusual to find one or two people still in the dinner hole. In his view, if a jack is taken off a locomotive for the purpose of lifting track directly in front of the locomotive, or in close proximity thereto, then a violation would not occur. However, he indicated that he would have to investigate all of the circumstances to ascertain whether the jack was in fact removed from the locomotive for that purpose, or whether the locomotive had no jack in the first instance (Tr. 29-31). He confirmed that he made no investigation to determine whether the locomotive had been moved without a jack being on it, nor could he determine whether the locomotive would have been moved without a jack being placed on it. The jack which was ultimately placed on the locomotive to abate the citation was located inby the area where the locomotive was parked and he did not believe that the person who found it knew precisely where to look for it (Tr. 30-33).

With regard to the inoperative sanders, Mr. Wehr stated that he initially activated the sanding levers in question, and while the levers traveled to their full position, no sand was deposited on the tracks below. He left the area after informing the locomotive operator that he was under a citation, and he was later called back and informed that an adjustment had been made to the levers and they were in fact operable (Tr.36-39).

Mr. Wehr stated that normal coal production begins at approximately 8 a.m. when the shift begins, but he made no notes as to when coal was actually loaded.

He observed the locomotive at 10 a.m., and if in fact production and loading began at 8 a.m., that would have been sufficient time for the locomotive operator to have made his preshift locomotive inspection (Tr. 51). Mr. Wehr also indicated that there was nothing to indicate that Mr. Jansante was aware that the sanders in question were inoperative and he said nothing to indicate that this was the case (Tr. 51-52). Mr. Wehr stated that once the operator was told that a citation was being issued, no one knew where to look for the jack, and he had to point out the location where he observed the jack against the rib (Tr. 64).

Inspector Wehr referred to notes which he had made at the time the citations were issued, and he stated that his notes reflect that at 9:10 a.m., he was at the face area where he issued another citation for a roof-bolting violation. That citation was abated at 9:40 a.m., and at 10:20 a.m., he observed the locomotive and detected the defective sanders (Tr. 105-106). He stated that he issued the citations because coal production had started, people were on the section, cars were being loaded, and he assumed that the pre-operational equipment checks had been made. He believed that there were three or four mine cars present for loading coal, and that possibly two or three were loaded, but he was not sure (Tr. 110).

Although Mr. Wehr indicated that he made no notes as to whether coal production had started and that he personally observed no coal being loaded, he did recall one mine car being loaded (Tr. 53). He conceded that the locomotive which he cited was located outby the loading point, and that he saw no locomotive being moved (Tr. 53-54).

In response to bench questions, Mr. Wehr indicated that the locomotive in question did have a jack bar, and that the jack which was missing was retrieved within 5 minutes and placed back on the locomotive (Tr. 55). He also confirmed that each mine section has two lifting jacks present for use in jacking up shuttle cars, changing flat tires, etc. (Tr. 56). He believed that the jack which was found was not the same one which may have been on the locomotive because the one which was eventually placed on the locomotive was first observed by him lying against the rib. Since it had rock dust on it, he believed that it had been there for a while. He also indicated that he had seen the jack propped against the coal rib before he issued the citation and that is why he stopped to check the locomotive in the first place (Tr. 57-58).

Respondent's Testimony and Evidence

Timothy G. Jansante, currently employed by the Post Office Department, testified that he previously worked for the respondent as a locomotive motorman. He testified that on December 9, 1980, he was in the "dinner hole" having a snack before the start of his work shift when the inspector appeared at approximately 9 a.m., and inquired as to who would be operating the No. 8 locomotive. He acknowledged to the inspector that he was the operator and when the inspector asked whether he had a jack, he replied that he did not know and he did so because he had not started his shift, nor had he hauled

any coal with the locomotive. Mr. Jansante indicated that as far as he knew, the shift immediately prior to his was a down shift, and that the locomotive was used prior to the down shift to haul coal. He also indicated that prior to operating the locomotive his normal routine is to check for the jack, and inspect the sanders, brakes, and lights. If any defects are detected, he would take care of minor problems, and major problems are reported to the dispatcher (Tr. 77-81).

Mr. Jansante stated that since he had not checked the locomotive, he had no idea where the jack was located. As for the sanders, he indicated that although the lever worked most of the time, "once in a while" it would stick. On the day in question, after the inspector observed that it would not work, he (Jansante) climbed up into the locomotive and started kicking the lever, and he indicated that "that's how I got it free and the sanders started to work" (Tr. 81). He obtained a jack about a block or so from where the locomotive was parked and he did so after the section foreman advised him where it was located. The foreman also advised him that road work was going on during the previous shift and he (Jansante) believed the jack was used to facilitate the blocking of track. When asked whether any road work was going on during the shift, he replied "there was no road work going on," and that "they don't do any road work when they are loading coal" (Tr. 82-83).

Mr. Jansante stated that from his experience with previous locomotive derails, placing it back on the track with a jack was difficult, and he denied that he would have moved the locomotive had he discovered that the jack was missing or that the sanders were inoperative. He did not believe that the inspector was present when he finally got the sanders to operate, and he did not discuss the inoperative sanders with the inspector and "just did what he asked me to do" (Tr. 84). He also testified that coal was being loaded at the time, but that he had not hauled any with the locomotive (Tr. 85).

On cross-examination, Mr. Jansante confirmed that until the inspector pointed out to him that the jack was missing from its usual place on the locomotive, he was unaware that it was missing. He also confirmed that the locomotive could have been operated along the track from where it was parked, but that he was the only authorized operator assigned to operate it on the shift in question. He believed that the inspector advised the section foreman as to where the jack which was retrieved was located and that the section foreman in turn advised him where it could be found. As for the defective sander lever, he acknowledged that the same condition may have existed "a couple of times" during the previous 2 years. He also confirmed that once the lever was "forced" by kicking it, it operated properly. He stated that given the opportunity, he would have checked his locomotive before operating it, but that he had no opportunity to check it before the inspector got to it and issued the citations (Tr. 83-88). He also indicated that if the locomotive had been inspected on the prior shift and found to be defective, the condition would have been noted, but that was not the case as far as he knew since no one informed him that the sanders were inoperative or that the jack was missing. He acknowledged that someone had to drive the

locomotive to the ramp where it was parked when the inspector observed it (Tr. 89).

Findings and Conclusions

Fact of Violations

The citations issued in this case concern alleged violations of the safety standards dealing with transportation of men and materials promulgated pursuant to sections 101 and 314(b) of the Act. Section 314(b), which is codified at 30 C.F.R. § 75.1403, authorizes an inspector to issue safeguard notices, which in his judgment will adequately minimize hazards connected with the transportation of men and materials in a particular mine. The regulatory criteria under which a mine inspector is required to be guided in issuing safeguard notices for a particular mine are those set forth at sections 75.1403-2 through 75.1403-11.

It seems clear that the purpose of issuing safeguard notices is to initially bring to the attention of a mine operator conditions or practices in the mine which require attention in order to minimize or eliminate hazards with respect to the transportation of men and materials in the mine. Safeguards are issued on a mine-by-mine basis, and once issued, they become mandatory for the particular mine in which they are issued. Pursuant to section 75.1403-1(b), once a safeguard notice is issued, the mine operator is required to provide the safeguard within the time fixed by the inspector. The operator is also required to thereafter maintain the safeguard, and if he does not, a citation may issue pursuant to section 104 of the Act.

In my view, the use of safeguard notices is a rather unusual practice. Absent any specific mandatory safety standard to guide a mine operator, the inspector has discretion under section 75.1403 to require a mine operator to comply with a safeguard which the inspector believes will minimize a perceived hazard connected with transportation of men and materials. In short, the inspector is authorized to issue safeguards which in effect become mandatory standards for the particular mine, and the operator has no opportunity to challenge the inspector's initial judgment or to provide any comments or suggestions regarding a particular safeguard. The only opportunity for an operator to challenge the inspector's judgment is during a hearing after a noncompliance citation is issued. In these circumstances, I believe that safeguard notices should be strictly construed, and the inspector must follow the criteria stated in section 75.1403-1. In this regard, I take note of prior decisions by Judge Michels in MSHA v. Jim Walter Resources, Inc., BARB 78-652-P, 1 FMSHRC 1317 (September 4, 1979), vacating a citation after finding that an operator was not in violation of the specific terms of a previously issued safeguard notice, and Judge Broderick in MESA v. Jones & Laughlin Steel Corporation, PITT 77-31-P (March 24, 1979), where he vacated a citation issued for a violation of section 75.1403, after finding that the operator had not failed to comply with a previously issued safeguard notice requiring the operator to provide safe riding facilities for persons riding on a locomotive. Additional reported cases dealing with

violations of the safeguard notice provisions of section 75.1403 are as follows:

In MSHA v. Sewell Coal Company, WEVA 79-293, 1 FMSHRC 96 (January 24, 1980), Judge Bernstein affirmed a citation for a violation of section 75.1403-6(b)(3), after finding that a track-mounted, self-propelled personnel carrier had only two of its four sanding devices in operational working order. The facts reflected that at the time of the citation, the vehicle was about to carry seven men into the mine over some narrow and steep terrain.

In MSHA v. Clinchfield Coal Company, NORT 78-325-P, 1 FMSHRC 25 (January 14, 1980), Judge Steffey affirmed a citation for a violation of section 75.1403-10, after finding that the last mine car out of a trip of 17 cars being pulled out of the mine by a locomotive failed to have a light or reflector installed on it as required by section 75.1403-10(a).

In MSHA v. Eastern Associated Coal Corporation, MORG 75-393, IBMA 76-55, 1 FMSHRC 1473 (October 23, 1979), the Commission affirmed a violation of section 75.1403, concerning an inoperable parking brake on a track-mounted, self-propelled personnel carrier (a jitney).

In Consolidation Coal Company v. MSHA, WEVA 79-171-R, 1 FMSHRC 1638 (October 19, 1979), Judge Broderick vacated a withdrawal order after finding that the period of time fixed for abatement of a violation of section 75.1403 was unreasonable. However, he found that a safeguard notice issued pursuant to section 75.1403, requiring the operator to maintain haulage tracks in a safe workmanlike manner, taken in conjunction with the citation which was issued by the inspector, constituted a violation of the cited standard.

Petitioner's Arguments

MSHA's arguments in support of the citations issued in this case include an admission by counsel that the safety standard is ambiguous. Even so, counsel argues that it is deliberately ambiguous so as to enable an inspector to exercise some discretion requiring safeguards on a mine-by-mine basis. Further, counsel argues that the mine in question has a history of haulage accidents and haulage violations and that is the reason why the safeguards for the mine were issued in 1973 and 1974 (Tr. 114).

Turning to the facts of the case, MSHA argues that the safeguard notices require the respondent to at all times maintain a jack on the locomotive and to insure that the sanding devices are operational. Since the inspector noted the violations approximately 2-1/2 hours into the shift, counsel asserts that it is not unreasonable to require the locomotive operator to make his preoperational check prior to the beginning of production, particularly where it is possible for anyone to climb aboard and drive the locomotive away. Failure to conduct a preshift inspection of the locomotive would expose that person and possibly others in the event sand was needed for traction, or the locomotive derailed and the operator attempted to right it by lifting it manually (Tr. 115-118). Since the locomotive was not provided with a jack, and two of its

sanders were inoperative at the time the inspector observed the locomotive, MSHA maintains that it has established the violations in question. And, since the respondent was on previous notice as to the requirements provided by the safeguards, MSHA believes that the respondent was negligent.

Respondent's Arguments

Respondent's defense is based on an assertion that at the time the inspector examined the locomotive it was not in operation but simply parked on the track. In these circumstances, respondent asserts that the locomotive operator had not had an opportunity to examine his locomotive prior to putting it in operation and that had he been given that opportunity, he would have discovered that the jack was missing and provided one. Respondent maintains further that company policy requires the locomotive operator to inspect it before placing it in operation and that by issuing the citation before giving the operator an opportunity to complete his inspection, the inspector acted arbitrarily (Tr. 122-125).

In the instant case, it is clear from the evidence presented that the parked locomotive in question was provided with a jack-lifting bar, but that the jack was missing at the time the inspector observed it. As for the cited sanding devices, it is also clear that the sanders were filled with sand, but that the lever stuck at the precise moment the inspector asked the operator to activate it and found that no sand was dispersed. A jack which the inspector had observed against the rib while on his way to the locomotive was retrieved within minutes and placed on the locomotive to abate the citation, and after giving the sanding lever a kick with his foot, sand was dispersed and the inspector abated the second citation.

As I observed during the course of the hearing in this case, counsel for both sides indulged in a great deal of speculation in presenting their respective cases. Respondent argued that the missing jack probably was taken off the locomotive to perform some maintenance work on the roadway during the prior shift. However, no credible testimony was forthcoming to support this conclusion. As a matter of fact, respondent's sole witness testified that he saw no road work being performed while he was present. The inspector did not believe that the jack which was provided to abate the citation was the same one taken from the locomotive because it had rock dust on it. I simply do not believe he knew whether it was the same one or not.

MSHA's conclusions that the safeguards were initially issued in 1973 and 1974 because of mine-haulage accidents and noncompliance with other haulage safety standards is unsupported by any credible evidence. While there are a number of citations for section 75.1403 listed in the computer printout detailing the prior history for the mine in question (Exh. G-3), absent any details as to the specific circumstances connected with those citations, I simply cannot accept an unsupported argument that they all involve haulage locomotives.

Since no one bothered to look at the preshift books for December 9, 1980, the parties conceded that there is no information available as to whether any

entries may have been made for the locomotive in question (Tr. 119). Although the inspector made notes of the times when he made his observations concerning the missing jack and inoperative sander, he did not check the preshift records, nor did he make any notes as to whether coal was actually being loaded, whether the locomotive was energized, whether cars were coupled to it, etc. It seems to me that these factors are critical to any determination as to whether there is a reasonable inference that the locomotive operator was about to move the locomotive without conducting his usual operational inspection at the time the inspector appeared on the scene. Since the citation issued nearly a year ago, the inspector could not specifically recall any of the critical details connected with the issuance of the citations.

According to the inspector's interpretation of section 75.1725, all of the required equipment checks should be made during the normal work shift, but he conceded that the locomotive operator could wait until coal loading was completed before checking and moving the locomotive (Tr. 111). In addition, he agreed that the safeguard notices speak in terms of operating equipment, and that his citations also use the word "operating." He further explained the rationale for issuing the citations as follows (Tr. 111-113):

JUDGE KOUTRAS: * * * Let me ask you this. Assuming that the locomotive operator told you, look, I don't have a jack and the sander levers aren't working but, let me see what the problem is and if I can get the jack on there and get the sanding levers operating before they finish loading those mine cars, what would be your reaction to that?

THE WITNESS: I'd have a good reaction. Because to me, the individual is aware that there is said violations of law, and he's trying to take the corrective measures to fix them before he even makes an attempt to move it. And, he's notified me through communication that that's what he's going to do.

JUDGE KOUTRAS: But, the story I'm getting now, from the operator in this case, is that you didn't give the locomotive operator an opportunity to pre-check his thing, before you dropped the citations on him?

THE WITNESS: The man ought to--like you said to ask exactly--but, the--if the individual, at that time, had said, hey, look, I haven't even made my pre-op check yet and I don't know what's there or what's not there--it would have made a difference, yes.

JUDGE KOUTRAS: But, that wasn't communicated?

THE WITNESS: It wasn't communicated, no sir.

After careful consideration of all of the testimony and evidence adduced in this case, including the arguments advanced by the parties in support of

their respective positions, I conclude that the respondent has the better part of the argument. While it is true that the petitioner has established that the jack was missing from the locomotive and that the sanding lever was inoperative when the inspector first viewed the parked locomotive, I cannot conclude from the facts presented in this case that the petitioner has established that the locomotive in question was being operated or was about to be operated before the inspector arrived on the scene. As a matter of fact, the inspector himself conceded that the locomotive operator could wait until the mine cars were loaded before conducting his inspection and moving the locomotive. In this case, I simply cannot conclude that petitioner has established through any credible testimony or evidence that the mine cars were loaded and waiting to be pulled away by the locomotive at the time the inspector walked past the parked locomotive.

I believe that the locomotive operator in this case should have been given a reasonable opportunity to inspect his locomotive, and absent any evidence that he is required to conduct such an inspection at the start of the shift, the fact that the inspector observed the conditions 2 hours into a production shift is not critical in my view. I reject the notion that a locomotive operator has to inspect a parked locomotive as soon as he arrives on the shift to insure that some unauthorized person driving it away has access to a jack and a workable sanding device. If MSHA believes that this is a problem, then I suggest it consider amending the safeguard notices issued at this mine to make it absolutely clear that locomotive operators are required to inspect their equipment at the start of any shift, rather than waiting until such time as all of the mine cars are loaded and ready for haulage out of the mine.

I note that the criteria for self-propelled personnel carriers found in section 75.1403-6(b)(1) and (3), specifically require a suitable lifting jack and bar as well as well-maintained sanding devices. Although the April 26, 1974, safeguard notice was specifically directed to self-propelled mantrip cars, it also included all haulage equipment equipped with sanding devices, and I assume that this also covers locomotives, but the record is not clear on this point. It would seem to me that MSHA should promulgate similar criteria for locomotives used underground. Since operational sanding devices and lifting jacks appear to be desirable items common to all locomotives, it seems more logical to me to promulgate specific criteria covering this situation rather than to rely on safeguard notices which quite frankly leave much to the imagination and intermingle mantrip vehicles with locomotives used to pull loaded mine cars.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED that the two citations issued in this case be VACATED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 3 1981

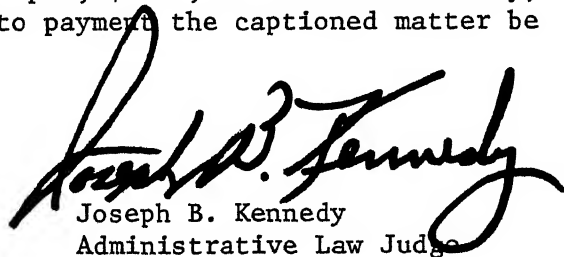
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 81-83
Petitioner	:	A.O. No. 44-03614-03026V
	:	
v.	:	Harman 5-B Mine
	:	
HARMAN MINING COMPANY,	:	
Respondent	:	

DECISION AND ORDER

For the reasons set forth in the motion to approve settlement, the parties request approval of vacation and withdrawal of the four canopy violations and payment in full of the penalties assessed for the alleged deficiency in rock dust and excessive accumulation of combustibles.

Based on an independent evaluation and de novo review of the circumstances and justifications offered, I find the disposition proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to approve vacation and settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, \$1500, on or before Friday, November 20, 1981 and that subject to payment the captioned matter be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

NOV 4 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 79-32-M
	Petitioner	: A/O No. 33-00013-05004
v.	:	
	:	Basic Refractories Quarry
BASIC REFRACTORIES,	:	and Plant
	Respondent	:

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Petitioner;
Jack A. Klein, Esq., Doehrel & Klein, Columbus,
Ohio, for the Respondent.

Before: Judge Cook

I. Procedural Background

On June 26, 1979, the Secretary of Labor (Petitioner) filed a petition for assessment of civil penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The petition charged Basic Refractories (Respondent) with 13 violations of various provisions of the Code of Federal Regulations, as set forth in citations issued pursuant to section 104(a) of the 1977 Mine Act. The Respondent, acting through its safety director, filed an answer on July 12, 1979.

On November 5, 1979, the Respondent, through counsel, moved to amend its answer. The motion was granted on November 27, 1979, and the amended answer was filed on December 14, 1979.

Also, on November 5, 1979, the Respondent moved to extend the time period for discovery by interrogatory. The motion was granted on November 27, 1979.

On or about January 14, 1980, the Petitioner requested advice from its Arlington, Virginia, office as to whether the Interagency Agreement between

the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA), see 44 Fed. Reg. 22827 (April 17, 1979), and an August 3, 1979, interpretive memorandum issued by the Administrator for Metal and Nonmetal Mine Safety and Health, transferred jurisdiction over all aspects of the Respondent's operation, other than the quarry, to OSHA. As a result of this inquiry, the Petitioner filed a motion and supporting memorandum on March 20, 1980, requesting the vacation and dismissal of Citation Nos. 368863, 368877, 368885, 368886, 368888, and 368889. A determination granting the motion is contained herein.

On May 19, 1980, the Petitioner filed a motion and supporting memorandum requesting approval of settlement which encompasses Citation Nos. 368848, 368851, and 368854. A determination approving the settlement is contained herein.

On May 21, 1980, a notice of hearing was issued scheduling the remaining matters for hearing on the merits on August 7, 1980, in Bowling Green, Ohio. Subsequent thereto, counsel for the Respondent contacted the undersigned Administrative Law Judge to request a telephone conference for the purpose of requesting a continuance. The requested conference was held on July 29, 1980, with the undersigned Administrative Law Judge and representatives of both parties participating. Counsel for the Petitioner raised no objection to the continuance. Accordingly, an oral determination was made granting the requested continuance subject to the condition that the Respondent file a written motion formally setting forth the reasons for the request. The motion was filed on August 11, 1980, and an order was issued on August 20, 1980, continuing the hearing to November 14, 1980, in Bowling Green, Ohio.

The hearing was held as scheduled with representatives of both parties present and participating. The Respondent filed a trial brief, and made a motion to dismiss the proceeding at the close of the Petitioner's case-in-chief. A ruling on the motion is set forth herein.

Following the presentation of the evidence, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, the schedule was later revised due to difficulties experienced by counsel. The Respondent filed a posthearing brief and proposed findings of fact and conclusions of law on April 27, 1981. The Petitioner filed a posthearing memorandum on May 4, 1981. Neither party filed a reply brief.

II. Violations Charged

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>
368841	11/28/78	56.14-1
368846	11/29/79	56.11-1
368847	11/29/78	56.14-1
368848	11/29/78	56.14-1
368849	11/29/78	56.14-1

368851	11/29/78	56.14-1
368854	11/29/78	56.14-1
368863	11/30/78	56.14-1
368877	11/30/78	56.11-2
368885	12/06/78	56.14-1
368886	12/06/78	56.14-1
368888	12/06/78	56.14-1
368889	12/06/78	56.14-1

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called Federal mine inspector Michael Pappas as a witness.

The Respondent called Mr. Antony Dantuono, the mill foreman; and Mr. Raymond Ouellette, a mechanical engineer employed by the Respondent, as witnesses.

Both the Petitioner and the Respondent called Mr. Arthur Jibilian, the Respondent's safety director, as a witness.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a three-page document containing copies of Citation No. 368841, November 28, 1978, 30 C.F.R. § 56.14-1, the termination thereof, and the inspector's statement pertaining thereto.

M-2 is a three-page document containing copies of Citation No. 368846, November 29, 1978, 30 C.F.R. § 56.11-1; the termination thereof; and the inspector's statement pertaining thereto.

M-3 is a three-page document containing copies of Citation No. 368847, November 29, 1978, 30 C.F.R. § 56.14-1; the termination thereof; and the inspector's statement pertaining thereto.

M-4 is a three-page document containing copies of Citation No. 368849, November 29, 1978, 30 C.F.R. § 56.14-1; the termination thereof; and the inspector's statement pertaining thereto.

2. The Respondent introduced the following exhibits in evidence:

O-1, O-2, and O-3 are photographs pertaining to Citation No. 368841, November 28, 1978, 30 C.F.R. § 56.14-1.

O-4, O-5, and O-6 are photographs pertaining to Citation No. 368847, November 29, 1978, 30 C.F.R. § 56.14-1.

O-7, O-8, and O-9 are photographs pertaining to Citation No. 368849, November 29, 1978, 30 C.F.R. § 56.14-1.

O-10 contains three schematic drawings pertaining to Citation No. 368841, November 28, 1978, 30 C.F.R. § 56.14-1.

O-11 contains three schematic drawings pertaining to Citation No. 368847, November 29, 1978, 30 C.F.R. § 56.14-1.

O-12 contains three schematic drawings pertaining to Citation No. 368849, November 29, 1978, 30 C.F.R. § 56.14-1.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of the subject mandatory safety standards occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The Basic Refractories Quarry is a "mine" within the meaning of the 1977 Mine Act (Tr. 4-5).

2. Jurisdiction rests in the Federal Mine Safety and Health Review Commission with respect to Citation Nos. 368841, 368846, 368847, and 368849 (Tr. 4-5).

3. Jurisdiction rests in the Federal Mine Safety and Health Review Commission with respect to the citations encompassed by the May 19, 1980, settlement motion (Tr. 4-5).

4. The citations encompassed by the March 20, 1980, motion to dismiss are within the jurisdiction of the Occupational Safety and Health Administration (Tr. 4-5).

5. The size of the Basic Refractories Quarry was rated at approximately 358,329 production man-hours in 1978 (Tr. 4-5).

6. As of November 28 and 29, 1978, the Basic Refractories Quarry had no history of previous violations under the 1977 Mine Act. This was the first inspection of the facility conducted pursuant to the 1977 Mine Act (Tr. 5).

B. Respondent's Motion to Dismiss

The Respondent moved to dismiss the proceeding 1/ as relates to Citation Nos. 368841, 368846, 368847, and 368849 at the close of the Petitioner's case-in-chief on the grounds that the Petitioner had failed to establish a prima facie case as relates to the four violations charged. The motion was taken under advisement to be ruled upon at the time of the writing of the decision based solely upon the evidence contained in the record when the motion was made (Tr. 87-90).

Neither the Rules of Procedure of the Federal Mine Safety and Health Review Commission, nor the Administrative Procedure Act, nor the 1977 Mine Act set forth express standards governing the disposition of motions to dismiss at the close of an opposing party's case-in-chief. It is therefore appropriate to consult the Federal Rules of Civil Procedure for guidance. 29 C.F.R. § 2700.1(b) (1980).

Rule 41(b) of the Federal Rules of Civil Procedure provides, in part, as follows:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

In ruling upon a Rule 41(b) motion to dismiss, the trial court is empowered to weigh the evidence, consider the law, and find for the defendant at the close of the plaintiff's case-in-chief. 5 J. MOORE, FEDERAL PRACTICE, ¶ 41.13[4] at pp. 41-189 - 41-192 (1980). The trial court may grant the defendant's motion when the plaintiff fails to present sufficient evidence during its case-in-chief to satisfy its burden of proof. See Brennan v. Sine, 495 F.2d 875 (10th Cir. 1974), Woods v. North American Rockwell Corporation, 480 F.2d 644 (10th Cir. 1973); Pittston-Luzerne Corporation v. United States, 176 F. Supp. 641 (M.D. Pa. 1959).

1/ The Respondent used inaccurate terminology when it moved for what it termed a "directed verdict" at the close of the Petitioner's case-in-chief. Proceedings before Administrative Law Judges of the Federal Mine Safety and Health Review Commission are tried without juries. The Administrative Law Judge is the trier of fact. Therefore, the Respondent's motion has been treated as a motion to dismiss at the close of the Petitioner's case-in-chief for failure to sustain its burden of proof. See James v. Du Breuil, 500 F.2d 155, 156 n. 2 (5th Cir. 1974), Martin v. E. I. du Pont De Nemours & Company, Inc., 281 F.2d 801, 802 n. 1 (3rd Cir. 1960); 5 J. MOORE, FEDERAL PRACTICE, ¶ 41.13[1] at p. 41-177 (1980).

Citation No. 368846 charges the Respondent with a violation of mandatory safety standard 30 C.F.R. § 56.11-1 in that it failed to provide and maintain a safe means of access to a designated working place at the Basic Refractories Quarry and Plant. The evidence contained in the record when the motion to dismiss was made, insofar as material to the determination as to whether a violation occurred, consisted of a copy of the citation, testimony provided by Federal mine inspector Michael Pappas, and testimony provided by Mr. Arthur Jibilian, the Respondent's safety director. Such evidence, particularly Mr. Jibilian's testimony, is considered sufficient to support the conclusion that the Petitioner satisfied its burden of proof during its case-in-chief. Accordingly, the motion to dismiss will be denied as relates to Citation No. 368846.

Citation Nos. 368841, 368847, and 368849 charge the Respondent with three violations of mandatory safety standard 30 C.F.R. § 56.14-1 in that three specified tail pulleys were unguarded. The cited mandatory safety standard provides, in part, that tail pulleys which may be contacted by persons, and which may cause injury to persons, shall be guarded. 2/

The evidence contained in the record when the motion to dismiss was made, insofar as material to the determination as to whether the violations occurred, consisted of copies of the three citations, testimony provided by Inspector Pappas, and testimony provided by Mr. Jibilian. In each instance, both the inspector's testimony and the statements appearing on the face of the citation maintained that no guards whatsoever were provided on the three tail pulleys (Exhs. M-1, M-2, M-3; Tr. 11, 14-16, 49, 52, 55). The inspector's testimony indicates that the three citations were issued because of the exposure to pinch points presented by the unguarded tail pulleys (Tr. 12, 15, 16, 52).

As relates to Citation No. 368841, 3/ Mr. Jibilian testified that the cited tail pulley was located in the No. 37 plant. He further testified that the tail pulley was guarded and that, as a result of the guard, no one could be harmed (Tr. 64-65, 73-74).

2/ Mandatory safety standard 30 C.F.R. § 56.14-1 provides as follows:

"Gears; sprockets; chains; drive, head, tail and takeup pulleys; fly-wheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

3/ Federal mine inspector Michael Pappas issued Citation No. 368841 during the course of his November 28, 1978, inspection of the Respondent's Basic Refractories Quarry and Plant (Tr. 11). The citation alleges a violation of mandatory safety standard 30 C.F.R. § 56.14-1 in that "[a] guard was not provided on the tail pulley of the stock out belt under the filter" (Exh. M-1, p. 1).

As relates to Citation No. 368847, 4/ Mr. Jibilian testified that the cited tail pulley was located in a tunnel in Building 36. Walls abutted both the end and the west side of the tail pulley preventing access from those directions (Tr. 70). A walkway along the east side of the conveyor belt was the sole means of access to the tail pulley (Tr. 70). According to Mr. Jibilian, a guard measuring approximately 3 feet in length and 1 foot in width was present on the east side of the tail pulley. The pinch point was located at the bottom of the belt and was "fairly" inaccessible (Tr. 75).

As relates to Citation No. 368849, 5/ Mr. Jibilian testified that the cited tail pulley was located in the mill (Tr. 71-72). A walkway was located along the north side of the conveyor (Tr. 72). According to Mr. Jibilian, the tail pulley was guarded. One side of the tail pulley was against the wall and a guard was present on the other side. The pinch point was located at the bottom of the tail pulley and was covered by the guard (Tr. 76).

In view of the foregoing, it must be concluded that the evidence adduced during the Petitioner's case-in-chief contains patent contradictions as to whether guards were present on the three cited tail pulleys. It must be further concluded that such contradictions preclude a finding that the Petitioner sustained its burden of proof during its case-in-chief. The inspector's testimony throughout the Petitioner's case-in-chief clearly indicated that his present recollection on this point had dimmed with the passage of time, whereas Mr. Jibilian's recollection was intact. Mr. Jibilian is considered the more credible witness on the issue as to whether guards were present.

It should be noted, however, that at one point the inspector gave testimony to the effect that in November of 1978 it was his practice to cite all guarding violations, including those for inadequate guarding as opposed to a total absence of guards, by using the descriptive term "no guards" (Tr. 79-80). This testimony, in view of the other evidence adduced during the Petitioner's case-in-chief, is considered insufficient to support a determination that any guards present may have been inadequate. The comment was not made until after Mr. Jibilian testified that guards were present. Additionally, Inspector Pappas was initially quite evasive when cross-examined as to the implications of this statement as relates to the three subject guarding citations. But he ultimately reasserted his position that no guards were present (Tr. 80-81).

4/ Federal Mine inspector Michael Pappas issued Citation No. 368847 during the course of his November 29, 1978, inspection of the Respondent's Basic Refractories Quarry and Plant (Tr. 14-15). The citation alleges a violation of mandatory safety standard 30 C.F.R. § 56.14-1 in that "[a] guard was not provided on the tail pulley of No. 7 conveyor belt" (Exh. M-3, p. 1).

5/ Federal mine inspector Michael Pappas issued Citation No. 368849 during the course of his November 29, 1978, inspection of the Respondent's Basic Refractories Quarry and Plant (Tr. 16). The citation alleges a violation of mandatory safety standard 30 C.F.R. § 56.14-1 in that "[a] guard was not provided on the tail pulley of the No. 5 recrusher belt" (Exh. M-4, p. 1).

In view of the foregoing, the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief will be granted as relates to Citation Nos. 368841, 368847, and 368849.

Even assuming for purposes of argument that the Petitioner successfully established inadequate guarding during its case-in-chief, the evidence adduced by the Respondent during its case-in-chief was more than adequate to successfully rebut it. The evidence on the record taken as a whole will not support findings that the guards present on the three cited tail pulleys were insufficient to prevent contact with the pinch points.

The pinch point was located at the bottom of the tail pulley in each of the three instances cited by Inspector Pappas (Tr. 143-144). None of the three conveyors can operate in such a fashion that the pinch points would be located at the top of the pulley (Tr. 143-144, 147). All modifications made to abate the citations were requested by Inspector Pappas (Tr. 144-145).

As relates to Citation No. 368841, adjusting the belt was the only work that could be performed at the tail pulley with the belt in operation. No maintenance would have been performed near the pinch point unless the machine was turned off and the guards were removed (Tr. 158-159, 165). In order to achieve contact with the pinch point with the existing guards in place, an individual would have been required to lie on the floor and reach up under the guard through a point where the height between the floor and the bottom of the guard ranged from 4-7/8 inches to 7-1/4 inches (Exh. 0-2, Tr. 113, 179; Exh. 0-10). He would have been required to reach beyond his elbow in order to achieve contact with the pinch point (Tr. 113; Exh. 0-2). An individual in the normal course of his work would never assume such a position and reach up into the pinch point (Tr. 158-159).

The tail pulley was guarded on November 29, 1978, by the conveyor frame, expanded metal mesh guards, and sheet metal (Exh. 0-1, Tr. 93-94, 112; Nos. 1, 2, and 3 on Exh. 0-10, Tr. 202-205; see also Tr. 207-209). In order to abate the citation, the Respondent supplemented the existing guards by installing a guard across the end of the tail pulley, by installing a guard across the top of the tail pulley, and by installing guarding which covered only rollers along the conveyor belt (compare Exh. 0-1 with Exhs. 0-2 and 0-3, Tr. 103, 106-107, 119, 147-148; Nos. 4, 5, and 6 on Exh. 0-10, Tr. 202-205). However, none of the actions taken to abate the citation diminished any hazard of contact with the tail pulley pinch point (Tr. 118-119).

As relates to Citation No. 368847, the cited tail pulley was in a relatively isolated area where people did not travel during the course of a day's work (Tr. 145). In fact, employees would not pass the tail pulley because the end practically abutted the wall (Tr. 71). It appears that employees visited the area once a week to perform cleanup activities, and that such activities were usually performed with a hose. An oiler was scheduled to visit the area once every 1 or 2 weeks to administer lubrication. He used an extension fitting to perform this task. It appears that the lubrication

point was approximately 2 feet from the tail pulley (Tr. 70-71). Additionally, it appears that belt tension adjustments were made at the tail pulley (Tr. 181).

The best available evidence in the record indicates that an individual would have been required to either lie prone on the floor or assume an extremely low kneeling position with his trunk virtually parallel to the floor in order to reach up underneath the guard and above the belt in an attempt to achieve contact with the pinch point. It should be noted that such action would have been necessary to obtain exposure to the pinch point even after the citation was abated (see Exhs. 0-4, 0-5, Tr. 121-122, 124, 131, 229). There would have been no reason for a person to attempt such a feat during the normal course of his work. A man working around the tail pulley would not fall or kneel and subsequently stretch his arm up underneath the frame and into the pinch point.

The pinch point was guarded on November 29, 1978, by a guard installed on the east side of the tail pulley. Elements of the conveyor framework provided additional guarding (Tr. 122, 126, 131-132, 183-184, 187, 209-210, 217-219; Exhs. 0-4, 0-5, 0-11). To abate the citation, the Respondent installed guards across the top and the end of the tail pulley. The existing guard along the east side of the tail pulley was replaced with a somewhat larger one (Exhs. 0-4, 0-5, 0-6, 0-11; Tr. 209-210). The new guard installed on the east side of the tail pulley extended approximately as far downward as the old one. The best available evidence in the record indicates that the guarding installed to abate the citation allowed the same access to the pinch point as existed prior to November 29, 1978 (Tr. 124, 126, 131, 209-210).

As relates to Citation No. 368849, the crusher operator would, on occasion, use the walkway on the north side to merely walk past the tail pulley (Tr. 72-73, 146). No maintenance would have been performed near the pinch point while the belt was in operation (Tr. 165). A large nut passed through the frame at the end of the tail pulley and was used to adjust belt tension (Tr. 165-166, 192, 195, 196, 199). It was not possible for a maintenance man adjusting the belt tension to achieve contact with the pinch point (Tr. 165-166). In order to achieve contact with the pinch point, an employee would have been required to lie on the floor and place his hand through an extremely small opening at the bottom of the frame and reach upward (compare Exh. 0-7 with Exh. 0-9). An employee, in the normal course of his duties around the tail pulley, would never have performed such a feat (Tr. 157). Nor does it appear that an individual would have fallen down, placed his arm under the frame and reached upward (Tr. 157).

In order to abate the citation, the Respondent installed a guard across the top of the tail pulley and across the end of the tail pulley. The latter guard did not cover all of the tail pulley. Rather, it extended only approximately one-fifth of the distance from the top of the conveyor frame to the floor (Exh. 0-12, Tr. 222-224; compare Exh. 0-7 with Exh. 0-8). The guard along the north side of the tail pulley was replaced with a smaller guard.

It should be noted that the replacement did not extend as far downward as did the previous guard (compare Exh. 0-7 with Exh. 0-8). The guarding installed to abate the citation did not afford better protection as relates to the pinch point than the guard present when the citation was issued.

The foregoing evidence rebuts any suggestion that the guarding present when the citations were issued was inadequate to afford protection from the pinch points. It must be presumed that the Mine Safety and Health Administration, acting through Inspector Pappas, considered the guards present when the citations were terminated adequate to afford the requisite protection from the tail pulley pinch points (Exhs. M-1, p. 2; M-3, p. 2; M-4, p. 2; Tr. 52). However, it is clear that the guards installed to abate the citations afforded no better protection as relates to the pinch points than did those present when the citations were issued.

It appears that Inspector Pappas, in issuing the citations, was motivated in part by his apparent belief that pinch points were present at the top of the tail pulleys (see Tr. 50). Such belief would account for his recommendation that guards be installed across the tops and ends of the tail pulleys. This belief was clearly erroneous because none of the three conveyors can operate in such a fashion that pinch points would be formed at the top of the pulleys (Tr. 143-144, 147).

The inspector also gave testimony which indicated that guards were required across the ends and tops of the tail pulleys because it was "possible" that an individual could fall onto the top of the moving belt at a tail pulley and be transported to either a discharge chute or a crusher (Tr. 53). The inspector further indicated that the height of the tail pulleys prompted this concern (Tr. 78). It is significant to note, however, that the Petitioner has not argued this theory in its posthearing memorandum. Rather, the Petitioner styles the inspector's testimony as standing for the proposition that an employee falling on the moving belt could sustain bruises and lacerations. The Petitioner's characterization is erroneous because the inspector never testified to that effect. In fact, a person falling on a stationary object could sustain bruises or lacerations. There is no indication that falling atop the moving belt could have produced such injuries as a result of contacting moving machine parts. The inspector's testimony, when viewed as a whole, indicates that the three citations were issued solely because of the perceived exposure to pinch points.

Additionally, as noted above, one of the guards installed to abate Citation No. 368841, i.e., one of the guards recommended by Inspector Pappas, covered only some rollers along the conveyor belt. It is clear, however, that the Respondent was not charged with a violation of mandatory safety standard 30 C.F.R. § 56.11-1 insofar as belt rollers were concerned. The citation does not mention belt rollers, and the inspector never mentioned exposed rollers during his testimony. Furthermore, the testimony of Mr. Jibilian reinforces the conclusion that the Respondent was not cited for exposed rollers (Tr. 151-152). It is also significant to note that the Petitioner does not argue in

its posthearing memorandum that the exposed belt rollers form a basis for the charge of violation. In fact, exposed belt rollers are never mentioned in the posthearing memorandum.

In view of the foregoing, it would have to be concluded that the evidence on the record as a whole is insufficient to prove the occurrence of the violations charged in Citation Nos. 368841, 368847, and 368849.

C. Citation No. 368846, November 29, 1978, 30 C.F.R. § 57.11-1

1. Occurrence of Violation

Citation No. 368846 was issued by Federal mine inspector Michael Pappas during the course of his November 29, 1978, inspection at the Respondent's Basic Refractories Quarry and Plant (Tr. 10, 13). The citation alleges a violation of mandatory safety standard 30 C.F.R. § 56.11-1 in that "[a] safe means of access was not provided to the east walkway at the Symons screens" (Exh. M-2). The cited mandatory safety standard requires that "[s]afe means of access shall be provided and maintained to all working places." The term "working place," as used in Part 56 of Title 30 of the Code of Federal Regulations, means "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2.

The cited area was apparently located at the east end of the fourth floor in Building 36, also known as the mill or stone plant (Tr. 57). The building was undergoing renovation by an independent contractor when the citation was issued (Tr. 67). In fact, the independent contractor's employees were performing renovation work in the cited area when the citation was issued (Tr. 13, 67).

The nature of the construction being performed on the east walkway was the replacement of the beams and the floor plates (Tr. 155). It appears that a substantial amount of material was located on the east walkway when the citation was issued. This material consisted of old pieces of beams, oxygen-acetylene tanks, hoses, and other tools needed by the independent contractor's employees in the course of removing the old, deteriorated beams and in the course of installing the new beams (Tr. 67).

The citation alleges that safe means of access was not provided and maintained for the Respondent's employees who would perform work on the Symons screens. For the reasons set forth below, I find that the violation has been established by a preponderance of the evidence.

Mr. Arthur Jibilian, the Respondent's safety director, maintained at one point in his testimony that no employee requiring access to the screens would use the east walkway because any adjustments or other work would have been performed from the floor below (Tr. 69). However, he maintained at a later point in his testimony that employees occasionally work on the east end of the Symons screen, and that the east walkway is the sole means of access to the east end of the Symons screen (Tr. 74).

Mr. Antony Dantuono, the Respondent's mill foreman, testified that he considered the east walkway unnecessary for access to any work area because the adjustments to the Symons screen can be made from the floor below (Tr. 156, 160-161). In this regard, he testified, in effect, that he and the group leader were the only ones who performed the adjustments, that the two men usually performed the task together as a team, and that he always made the adjustments from the floor below (Tr. 160-161). However, he could not affirmatively testify that the group leader does not make the adjustments from the east walkway (Tr. 161).

Mr. Dantuono's testimony is not considered persuasive insofar as it maintains that no violation of mandatory safety standard 30 C.F.R. § 56.11-1 occurred. Mr. Dantuono affirmatively testified that the east walkway is used to adjust the different machines in the Symons screen (Tr. 156), and that "we go back on this walkway * * * to adjust a 54 sand cone" (Tr. 160).

In view of the foregoing, I find that the east walkway, at the time of the inspection, was maintained and used as a means of access for the Respondent's employees who periodically performed work on the Symons screens, or made periodic adjustments to the Symons screens. The fact that no work was being performed at the time of the inspection (Tr. 74-75), or that the east walkway was not a general traffic area (Tr. 68), do not constitute affirmative defenses.

The fact that all work or adjustments could have been performed from the floor below is not an affirmative defense to the charge of violation on the facts presented herein. The Commission has expressly rejected the view that the standard's mandate is met when one safe means of access to a working place exists. The standard imposes an affirmative obligation on the operator to make each means of access to a working place safe unless, for example, there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace. The Hanna Mining Company, 3 FMSHRC 2045, 2 BNA MSHC 1433, 1981 CCH OSHD par. 25,672 (1981).

As noted previously, the cited east walkway was part of an active construction site on November 29, 1978, and a substantial amount of material was present in the form of debris and tools. In fact, Mr. Dantuono testified that it was customary for the independent contractor's employees to allow the debris to remain until the job was completed (Tr. 155-156). It can therefore be inferred that the Respondent's employees who used the east walkway for access to the Symons screens were exposed to a tripping or stumbling hazard. Accordingly, it is found that the Respondent failed to provide and maintain safe means of access to the Symons screens for its employees.

The fact that the violative condition may have been caused by the activities of an independent contractor is not an affirmative defense. The Commission has held that a mine operator can be held responsible without fault for violations of the 1977 Mine Act or the mandatory health and safety

standards committed by independent contractors performing work on mine property. When the subject citation was issued, the Petitioner was pursuing a valid interim policy of citing mine operators for violations committed by independent contractors. Old Ben Coal Company, 1 FMSHRC 140, 1 BNA MSHC 2177, 1979 CCH OSHD par. 23,969 (1979), aff'd., No. 79-2367 (D.C. Cir., filed December 9, 1980).

In view of the foregoing, I conclude that a violation of mandatory safety standard 30 C.F.R. § 56.11-1 has been established by a preponderance of the evidence.

2. Gravity of the Violation

The record does not establish that individuals exposed to the tripping or stumbling hazard faced potentially serious injuries.

The record contains no reliable, probative, and substantial evidence as to the probability of the occurrence of the event against which the cited standard is directed, nor as to how severe the injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be. In this regard, it is significant to note that the statements recorded under the "gravity" heading on the inspector's statement (Exh. M-2, p. 3), are those of Mr. William Acuna, a Federal mine inspector-trainee who accompanied Inspector Pappas during the inspection (Tr. 18, 41), and are not the recorded observations of Inspector Pappas. Additionally, Mr. Acuna's observations were not recorded contemporaneously with the transaction or occurrence observed by him. Rather, he recorded his observations on the inspector's statement in December of 1978 or January of 1979 (Tr. 60).

Either Mr. Dantuono or the group leader would have been affected if the event against which the cited standard is directed had occurred.

In view of the foregoing, I find that the violation was nonserious.

3. Negligence of the Operator

The evidence presented clearly shows that the Respondent demonstrated negligence in connection with its failure to provide and maintain a safe means of access to the Symons screens.

As noted previously, Building 36 was undergoing renovation by an independent contractor when the citation was issued. In fact, the independent contractor's employees were performing renovation work in the cited area when the citation was issued. A substantial amount of material was present on the walkway, consisting of old pieces of beams, oxygen-acetylene tanks, hoses, and other tools needed by the independent contractor's employees in the course of their work. It can be inferred from the testimony of Mr. Dantuono, the mill foreman, that the condition had existed for a substantial period of time (see Tr. 155-156). The condition was sufficiently extensive and had existed for such a substantial period of time that the Respondent knew or

should have known that the east walkway was not a safe means of access to the Symons screens.

Yet the Respondent maintained and used the east walkway as a means of access to the Symons screens, in spite of its actual or constructive knowledge as to the unsafe condition. The mere fact that adjustments or other work could be performed on the screens from the floor below does not absolve the Respondent from negligence. It should be noted that Mr. Jibilian maintained at one point in his testimony that employees occasionally work on the east end of the Symons screens and that the east walkway is the sole means of access to such area (Tr. 74). 6/

Under the circumstances, the Respondent was under an affirmative obligation to undertake effective measures designed to prevent its employees from using the east walkway as a means of access to the Symons screens while the unsafe condition existed. Clearly, this obligation was not met.

In view of the foregoing, it is found that the Respondent demonstrated a high degree of ordinary negligence in connection with the violation.

4. Good Faith in Attempting to Achieve Rapid Compliance

The violation was abated within the time specified for abatement (Exh. M-2, p. 3; Tr. 41). Accordingly, it is found that the Respondent demonstrated good faith in attempting to achieve rapid compliance.

D. Size of the Operator's Business

The parties stipulated that the size of the Basic Refractories Quarry was rated at 358,329 production man-hours in 1978 (Tr. 4-5).

E. History of Previous Violations

The parties stipulated that as of November 28 and 29, 1978, the Basic Refractories Quarry had no history of previous violations under the 1977 Mine Act (Tr. 5).

F. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

No evidence was presented establishing that the assessment of a civil penalty in this case will adversely affect the Respondent's ability to remain

6/ Whether or not the east walkway is the sole means of access to the east end of the Symons screens is not the controlling consideration. The controlling consideration is that the Respondent maintained and used the east walkway as a means of access to the Symons screens with actual or constructive knowledge that such means of access was unsafe.

in business. In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 CCH OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore there is a presumption that the operator will not be so affected. I find, therefore, that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to continue in business.

VI. Petitioner's March 20, 1980, Motion to Dismiss

On or around January 14, 1980, the Petitioner requested advice from its Arlington, Virginia, office as to whether the MSHA/OSHA Interagency Agreement, see 44 Fed. Reg. 22827 (April 17, 1979), and an August 3, 1979, interpretive memorandum issued by the Administrator for Metal and Nonmetal Mine Safety and Health, transferred all aspects of the Respondent's operation, other than the quarry, to OSHA. As a result of this inquiry, the Petitioner filed a motion and supporting memorandum on March 20, 1980, praying for the vacation and dismissal of the following citations:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>
368863	11/30/78	56.14-1
368877	11/30/78	56.11-2
368885	12/06/78	56.14-1
368886	12/06/78	56.14-1
368888	12/06/78	56.14-1
368889	12/06/78	56.14-1

The memorandum in support of the motion to dismiss states, in part, as follows:

Petitioner has filed proposals for assessment of penalty alleging violation of regulations promulgated pursuant to the Federal Mine Safety and Health Act of 1977. In the course of its enforcement activities, the Mine Safety and Health Administration entered into an interagency jurisdictional agreement with the Occupational Safety and Health Administration. Interpretation and application of this agreement has proved difficult especially with respect to refractories located on mine property. A reinterpretation of the application of the agreement to the Respondent's Quarry and Plant necessitates dismissal and vacation of the following citations: 368863, 368877, 368885, 368886, 368888, 368889. Dismissal is consistent with the attached memorandum.

Attached thereto is a copy of a February 28, 1980, memorandum from Donald R. Tindal, Counsel for General Legal Advice, Mine Safety and Health, to Associate Regional Solicitor William S. Kloepper, concerning the proceedings in Secretary of Labor v. Basic Refractories, Docket Nos. VINC 79-199-PM,

LAKE 79-32-M, LAKE 79-40-M, LAKE 79-140-M, and LAKE 79-203-M. This memorandum states, in part, as follows:

Your memorandum of January 14, 1980, addressed to Roy Bernard, Deputy Administrator, Metal and Nonmetal Mine Safety and Health, concerning the above-captioned matter was referred to this office for reply. You request advice as to whether the MSHA/OSHA Interagency Agreement (33 FR 22827, April 17, 1979) and an interpretative memorandum of August 3, 1979, issued by the Administrator, Metal and Nonmetal Mine Safety and Health, [7/] transfer jurisdiction over all aspects of Basic Refractories, other than the quarry, to OSHA.

The MSHA/OSHA agreement provides that OSHA will have jurisdiction over "refractory plants." Agreement, ¶ B. 6. b. In the appendix to the agreement, it is accordingly stated that MSHA authority ends and OSHA authority begins with respect to refractory plants "after arrival of raw materials at the plant stockpile." The August 3, 1979, memorandum to the District Managers from Thomas J. Shepich, Administrator for Metal and Nonmetal Mine Safety and Health, elaborating on the agreement, states that an operation which is a free-standing mill engaging in milling and milling-related operations only, and which in the past has been inspected solely by MESA or MSHA remains subject to MSHA jurisdiction. On the other hand, refractory plants, i.e., operations involving milling and the manufacturing of bricks, clay pipe or other forms of finished refractories where there is a joint MSHA/OSHA presence, are now subject to OSHA jurisdiction.

7/ The August 3, 1979, memorandum from Thomas J. Shepich, Administrator for Metal and Nonmetal Mine Safety and Health, for MSHA district managers concerning MSHA jurisdiction over refractory mills states, in part, as follows:

"As you know, the MSHA/OSHA Interagency Agreement provides that OSHA shall have jurisdiction over 'brick, clay pipe and refractory plants' (Section B.6.b.). The effect of this clause is to grant to OSHA jurisdiction over plants which include a manufacturing process resulting in a product such as bricks, clay pipe, insulators or other finished forms of refractories. In these operations, both milling and manufacturing occur and there has been a joint MSHA/OSHA presence at one physical establishment.

"Section 3(h)(1) of the Mine Act states that '[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.' It was this type of dual jurisdiction that the provision was designed to correct. Therefore, in operations involving milling and the manufacturing of bricks, clay pipe or finished refractories, where there

As is reflected in the MSHA/OSHA agreement and Mr. Shepich's memorandum, the purpose of making the jurisdictional determination concerning refractory plants (and other types of operations covered by the agreement) is to eliminate dual jurisdiction "at one physical establishment," by making a "convenience of administration" determination as provided at section 3(h)(1) of the Mine Act (30 U.S.C. 802(h)(1)). Hence, where both milling and manufacturing take place at one identifiable establishment, OSHA is to assume jurisdiction. However, where a reasonable physical or practical separation can be made between associated establishments, for example, between a mine and a mill which has traditionally been inspected by MSHA, and an associated facility such as a refractory manufacturing plant, which has been inspected, or subject to inspection, by MSHA and OSHA, no "convenience of administration" determination need be made under section 3(h)(1) for the former facility, since at that establishment, there is no dual jurisdiction.

As we understand it, the Basic Refractories operation involved here includes a refractory manufacturing operation, which in turn includes both milling and manufacturing, and a quarry which is clearly a "mine" under MSHA jurisdiction. According to the flow chart provided as an attachment to your January 14 memorandum, the stone from the quarry is transported first to a crushing plant (plant 35) and then to a sizing plant (plant 36) and an AG stone plant (plant 37), prior to entering the storage silos. Some of the stone from plant 36 goes to the AG stone plant or directly to railroad cars and does not enter the storage silos. The use to which this stone is put is not indicated, but it apparently does not enter the refractory manufacturing operation. Stone is then transported as needed from the storage silos to various kilns and other plants (plants 51, 53, 54), where it is prepared for use as the raw material in the refractory plants (plants 60, 61, 72). The products of the refractory plants are then shipped by truck and rail to the users of the products.

fn. 6 (continued)

is a joint MSHA/OSHA presence, jurisdiction has been delegated to OSHA under the Interagency Agreement.

"The provision quoted above should not be applied to milling operations where there is no manufacturing process and OSHA presence. Therefore, a 'refractory plant,' which is a free-standing mill engaged in milling and milling-related operations only and which has been inspected in the past solely by MESA or MSHA, remains subject to MSHA jurisdiction and has not been transferred to OSHA's jurisdiction."

A copy of the August 3, 1979, memorandum was attached to a request for admissions filed by the Respondent on January 2, 1980.

Under the terms of the Mine Act and the MSHA/OSHA agreement, it is clear that the quarry should remain under MSHA jurisdiction. It is also clear that the shaped refractory and special refractory plants are engaged in manufacturing of "finished refractories" and are, therefore, under OSHA jurisdiction. The question to be determined under the "convenience of administration" provision of section 3(h)(1) and the MSHA/OSHA agreement is whether all or part of the remainder of the Basic Refractories facility can reasonably be regarded as an integral part of the refractories manufacturing plants and therefore, as part of a single "physical establishment" under OSHA jurisdiction; or whether some reasonable physical separation can be made in order to preserve MSHA jurisdiction over all or part of the remainder of the facilities.

Based on an examination of the flow chart attached to your memorandum and discussions with MSHA personnel, it is our view that the point in the process at Basic Refractories where the stone enters the storage silos is the point at which MSHA and OSHA jurisdiction separates. It is at this point where the raw material (stone) can be said to "arrive at the plant stockpile," per the MSHA/OSHA agreement. Agreement Appendix A. The operations taking place before the arrival of the stone at the storage silo, i.e., quarrying, crushing (plant 35), sizing (plant 36) and the AG stone plant operation (plant 37) are classical mining and milling operations, and could very well take place even if the facility were solely a quarry and not associated with a refractory plant. Thus, drawing the line for purposes of jurisdiction at the storage silos is consistent with the MSHA/OSHA agreement and is reasonable from the standpoint of a traditional view of mining and milling operations.

Accordingly, any MSHA citations or orders against Basic Refractories for violations relating to the quarry, the crushing plant (plant 35), the sizing plant (plant 36), or the AG stone plant (plant 37) should remain under MSHA jurisdiction.

The other outstanding citations should be vacated. Although these citations were validly issued, since they arose prior to the execution of the MSHA/OSHA agreement, and could legally support the imposition of a penalty if they are established, our position is that because jurisdiction has been transferred to OSHA, no useful purpose would be served by continuing to process the case to its conclusion.

In view of the foregoing, the Petitioner's March 20, 1980, motion to dismiss will be granted.

VII. Petitioner's May 19, 1980, Motion Requesting Approval of Settlement

On May 19, 1980, the Petitioner filed a motion requesting approval of settlement and dismissal of the proceeding, and also filed a memorandum in support thereof, encompassing three of the citations at issue in this case.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The proposed settlement is identified as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Assessment</u>	<u>Settlement</u>
368848-	11/29/78	56.14-1	\$ 84	\$ 84
368851	11/29/78	56.14-1	66	66
368854	11/29/78	56.14-1	66	66
Totals:			\$216	\$216

The Petitioner advances the following reasons in support of the proposed settlement:

The Respondent has agreed to pay the full amounts of the penalties proposed by the Office of Assessments for the [three] citations listed above. In support of the settlement, the Petitioner attaches the results of initial review, the proposed assessment, copies of the citations, terminations, and inspectors' statements compiled in documentation of the citations at issue.

The size of Respondent's Quarry and Plant is 358,329 man hours per year. The size of the operator is 911588 man hours per year. The operator employs 230 surface miners and no underground miners. The mine accrued a total of 48 assessed violations and 21 paid violations during the period November 31, 1976, through November 30, 1978. [8/]

The reasons given above by counsel for the Petitioner for the proposed settlement have been reviewed in conjunction with the information submitted

8/ The violations charged in these three citations allegedly occurred on November 29, 1978. As noted in Part V (E), supra, the parties stipulated at the hearing that as of November 28 and 29, 1978, the Basic Refractories Quarry had no history of previous violations under the 1977 Mine Act (Tr. 5). In view of the stipulation, it must be concluded that the Respondent has no history of previous violations cognizable in connection with these three citations.

as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

VIII. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. Basic Refractories and its Basic Refractories Quarry and Plant were subject to the provisions of the 1977 Mine Act at all times relevant to the issuance of the citations involved in this proceeding.

3. Federal mine inspector Michael Pappas was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The Respondent's motion to dismiss at the close of the Petitioner's case-in-chief will be granted in part and denied in part for the reasons set forth previously in this decision.

5. The Petitioner failed to prove the violations charged in Citation Nos. 368841, 368847, and 368849.

6. The violation charged in Citation No. 368846 is found to have occurred as alleged.

7. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

IX. Proposed Findings of Fact and Conclusions of Law

The Respondent filed a trial brief during the hearing on November 14, 1980. The Respondent filed a posthearing brief and proposed findings of fact and conclusions of law on April 27, 1981. The Petitioner filed a posthearing memorandum on May 4, 1981. Such submissions, insofar as they can be considered to have contained proposed findings of fact and conclusions of law have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

X. Penalties Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
368846	11/29/78	56.11-1	\$125
368848	11/29/78	56.14-1	84 (settlement)
368851	11/29/78	56.14-1	66 (settlement)
368854	11/29/78	56.14-1	66 (settlement)
			Total: \$341

ORDER

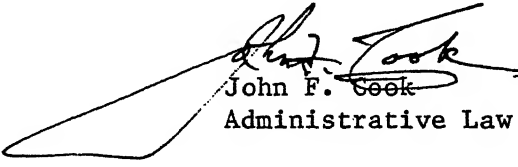
Accordingly, IT IS ORDERED that the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief be, and hereby is, DENIED as relates to Citation No. 368846.

IT IS FURTHER ORDERED that the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief be, and hereby is, GRANTED as relates to Citation Nos. 368841, 368847, and 368849; that such citations be, and hereby are, VACATED; and that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to such citations. In the alternative, vacation and dismissal IS ORDERED as relates to such citations because the Petitioner failed to prove the violations charged by a preponderance of the evidence on the record as a whole.

IT IS FURTHER ORDERED that the settlement outlined in the Petitioner's May 19, 1980, motion requesting approval of settlement be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that the Petitioner's March 20, 1980, motion to dismiss be, and hereby is, GRANTED; that Citation Nos. 368863, 368877, 368885, 368886, 368888, and 368889 be, and hereby are, VACATED; and that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to such citations.

IT IS FURTHER ORDERED that the Respondent pay civil penalties totaling \$341, as set forth in Part X, supra, within 30 days of the date of this decision.


John F. Cook

Administrative Law Judge

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Administrator for Metal and Nonmetal Mine Safety and Health,
U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 4 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 81-45-M
Petitioner	:	A.O. No. 11-00791-05009I
	:	
v.	:	Minerva Mine No. 1
	:	
INVERNESS MINING COMPANY,	:	
Respondent	:	

DECISION AND ORDER

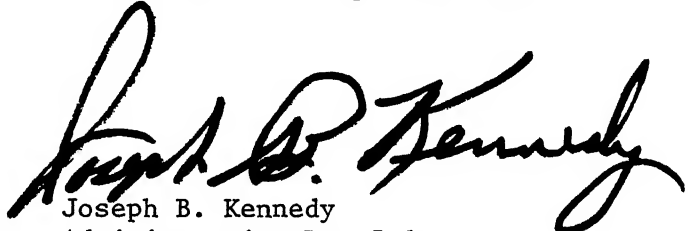
The parties move for approval of a settlement of a non-fatal roof fall accident case alleging a violation of 30 C.F.R. 57.3-22. This requires that miners examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter and that loose shale be taken down or adequately supported before any other work is done.

The accident investigation established that at the beginning and throughout the shift the miners and their supervisor were at all times aware of the fact that there was questionable shale at the back of the drift, but that due to the pressure to catch up with production the miners and their supervisor decided to take a chance that it could be worked without testing. That this was in accord with the policy of top management was established by the angry reaction of the plant manager, John Kerns, and the superintendent, Bill Hobbs, to the inspector's decision to issue the citation. It is just this "take a chance" attitude toward safety that leads to so many fatal and disabling accidents. Every neophyte in the mines knows the rule that every time a miner enters a new work area he should make a visual and vibration test before starting work. Here experienced miners were encouraged to ignore sound safety practices because the top management of a new operation was pushing for production.

Top management's attitude alone justified the penalty of \$2500 originally proposed. Because of the effort made to muddy the waters, MSHA proposed a settlement of \$1,000 or 40% of the amount initially proposed. The trial judge rejected this and suggested \$1500. This proposal was accepted by counsel for the operator on October 31, 1981.

Based on an independent evaluation and de novo review of the circumstances, I reluctantly conclude that payment of the reduced penalty can be justified only on the ground that this is a new operation and this was the first violation of the standard cited. Nevertheless, it is my opinion that this operation bears close scrutiny and that unless top management's attitude changes serious violations will continue to occur. I will expect that the next time around the Solicitor will recognize that miners who are induced to contradict their contemporaneous statements are still reliable witnesses of what actually transpired and that little weight is to be accorded self-serving afterthought statements elicited under pressure from the operator.

Accordingly, it is ORDERED that the motion to approve settlement, as amended, be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, \$1500, on or before Friday, November 27, 1981, and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 4 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 79-31
Petitioner	:	A.O. No. 46-01478-03014
	:	
v.	:	Sewell U.G. No. 1 Mine
	:	
SEWELL COAL COMPANY,	:	
Respondent	:	

DECISION AND ORDER

Pursuant to the order of remand, the trial judge issued an order to show cause which afforded the parties an opportunity to be heard on the issue of the availability of the defense of "diminution of safety" or "greater hazard" in an enforcement proceeding. As the Commission's decision pointed out, in this case, unlike Penn Allegh Coal Company, 3 FMSHRC 1392 (1981), the operator (1) filed a petition for waiver of the canopy requirement prior to issuance of the notice of violation, (2) the petition was granted before the enforcement proceeding was adjudicated, and (3) at the time the first motion to approve settlement was submitted notice of the finality of the waiver of the canopy requirement for the equipment in question had been published in the Federal Register. It had, therefore, the force and effect of law.

Despite this, counsel for the Secretary contends that because the operator has waived its rights by twice agreeing to pay a token penalty, the trial judge and the Commission must ignore the importance of the issue raised by the remand. Counsel also asks that the Commission ignore the fact that the operator, in response to the show cause order, has withdrawn its settlement proposal and now prays the matter be dismissed.

The citation to P & P Coal Co., 6 IBMA 86 (1976), is inapposite. This is not, as counsel suggests, a default proceeding in which the trial judge has, on his own motion, raised an affirmative defense never established in the record. It is rather a case for application of the Commission's rule that the trial judge has "inherent authority to question whether, as a matter of law, a case before him presents a cause of action." Olga Coal Co., 2 FMSHRC 2769 (1980). This, in turn, depends on whether, as a matter of law, the defense of "diminution of safety" is available to the operator in this case. Indeed, the case was remanded for the express purpose of permitting the trial judge to make this determination.

My conclusion is that the defense is available and has been established. Therefore, MSHA's motion to approve settlement must be denied and the matter dismissed.

MSHA's arguments against such a disposition are without merit. Contrary to the Secretary's contention, I have not attempted to overrule the Administrator's decision with respect to the Galis 300 roof bolter. I have merely concluded that evidence in this record, which was not before the Administrator, 1/ established that, independent of the Administrator's decision, sufficient practical technology did not exist on the date of the alleged violation to warrant imposition of an obligation to install canopies in either a 48 inch or 50 inch mining height.

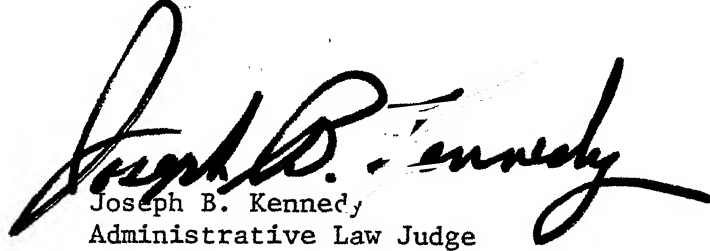
In regard to the Joy 16SC shuttle car, the claim by MSHA that the Administrator's decision was not predicated on a finding that use of canopies on the shuttle cars diminished the safety of the miners is clearly erroneous. As the operator's response points out, at no time did the operator propose an alternate method of compliance. Instead what was sought was a total waiver of the requirement on the ground that compliance was technologically impossible without diminishing the safety of the miners. 30 U.S.C. § 861(c) (1970); § 811(c) (1977). MSHA's afterthought argument is a thinly disguised effort to evade the estoppel imposed by the Administrator's decision on maintenance of the enforcement proceeding.

Nor does the fact that the operator installed a canopy in a 43 inch clearance establish that its use did not diminish the safety of the miners. One of the great failings of the canopy program is MSHA's callous indifference to whether or not the requirement for installation of canopies is compatible with the safety of the miners who must use them. The canopy standard has been repeatedly criticized by both miners and operators for creating in medium and low coal more hazardous conditions than it cures. It is this type of irresponsible enforcement that leads both miners and coal operators to contend that MSHA's canopy standard is an arbitrary and dangerous exercise of regulatory power.

Finally, I find counsel's attempt to redact or to expunge unilaterally and ex parte the record of the representations made by the parties in support of their original motion as feckless and irresponsible at best and reprehensible at worst. Those representations and stipulations were highly material to the initial disposition made of this matter. Furthermore, they were relied upon and quoted from at length by the Commission. As the attached affidavit by my clerk shows, at no time did she tell Mr. Kramer to file a new motion for settlement that would "supersede and replace Mr. Street's previously filed motion."

1/ Such as, the parties' representation as to the experimental nature of canopy technology in January 1976; the injuries to miners performing tramming operations with canopies; and the fact that the notice was modified a month after its issuance to show the minimum mining height on the section at the time of the alleged violation was 5 inches less than stated.

Consequently, for the reasons set forth in this decision and in my show cause order of September 30, 1981, as appended hereto and incorporated herein, I conclude the defense of diminution of safety or greater hazard is a bar to this enforcement proceeding. Accordingly, it is ORDERED that the pending motion to approve settlement be, and hereby is DENIED and the captioned matter DISMISSED with prejudice.


Joseph B. Kennedy
Administrative Law Judge

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ATTACHMENT TO DECISION AND ORDER DATED November 4, 1981
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 30 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 79-31
Petitioner	:	A.O. No. 46-01478-03014
	:	
v.	:	Sewell U.G. No. 1 Mine
	:	
SEWELL COAL COMPANY,	:	
Respondent	:	

ORDER TO SHOW CAUSE

Upon remand from the Commission, 3 FMSHRC 1402 (1981), of my decision of September 20, 1979, 1 FMSHRC 1379 (1979), the parties once again move for approval of a settlement based upon the assessment of a token penalty of \$50.00 for the two violations of the canopy standard alleged. I share the parties obvious desire to see an end to this administrative whirlwind. Nevertheless, because the Commission saw fit to remand the matter and because of the importance of finding a proper balance between an enforcement and a modification proceeding, I undertake with the greatest reluctance to once again set forth the reasons for my disagreement with the Secretary's and the Commission's assertion that because compliance is claimed to be technologically possible diminution of the safety of the miners is irrelevant to enforcement of the canopy requirement or, if it is not, the affirmative defense of diminution of safety was not, in fact, made out.

My earlier decision found that with respect to (1) the two pieces of face equipment in question, a Galis 300 roof bolter and a Joy 16 SC shuttle car, and (2) the coalbed or mining heights involved (50 inches and 43 inches respectively), compliance with the canopy requirement set forth in the "improved" mandatory safety standard, 30 C.F.R. 75.1710-1(a), was "impossible without diminishing the safety of the miners". 1 FMSHRC 1380. In addition, I held that the Secretary's failure to comply with the mandatory safety standard set forth in section 318(i) of the Mine Safety Law, 30 U.S.C. § 878(i), 1/ rendered the improved standard

1/ This provision requires that the mechanical and electrical components of face equipment be "designed and constructed in accordance with the specifications" of the Secretary. The Commission held this requirement is met by a performance specification that relates only to the tensile strength of the canopy and not to its suitability for safe use under widely varying mining conditions. Despite the plain language of the Congressional directive, the Commission held the Secretary could short circuit his responsibility for designing and constructing safe canopies by delegating it to the coal operators and enforcing a requirement for canopies without regard for whether or not "technological compliance" diminishes the safety of the miners.

"null, void and unenforceable". My decision further held the improved standard was unenforceable as applied to the specific undisputed facts of this case because it violated section 101(a)(9)'s, formerly section 101(b)'s, (30 U.S.C. § 811(a)(9)) prohibition against issuance or enforcement of any improved standard that "reduces the protection" afforded the miners by a Congressionally enacted standard, namely section 318(i). It is part of the conventional wisdom that the best test of whether a mining practice or device is safe is to observe the conditions under which it must operate. By that test the requirement for canopies in mining heights in medium and low coal (less than 60 inches) has been shown to be technologically infeasible which, whether the Commission believes it or not, translates into the creation of serious new hazards and the aggravation of old hazards. 2/

In regard to the technological infeasibility of canopies, I take official notice of the following from a Report to the Congress of the United States by the Comptroller General entitled "Low Productivity In American Coal Mining: Causes and Cures", Rpt. No. EMD 81-17, issued March 3, 1981:

Technically infeasible requirements

Coal operators complain that some MSHA regulations require technology which is exotic or unavailable. Since MSHA enforces these regulations, the resulting inspections, violations, withdrawal orders, machine modifications, and paperwork reduce productivity. The two regulations that mine managers cite most frequently are requirements for cabs and canopies and mine illumination.

Cabs and canopies are steel roof and sides which protect mining machine operators from collapse of roof, face, or rib. On January 1, 1973, protective cabs and canopies became mandatory on all mobile face equipment used in mines 72 inches and above in height. By 1978, coal mines of all seam heights had to comply with this regulation. Mines with 60 inch or higher seams have generally not had problems in fitting cabs and canopies to their machines. However, 45 percent of production and 41 percent of mines have seams under 60 inches. Low coal and narrow

2/ I held the Secretary's failure to comply with section 318(i) in promulgating the improved standard violated section 101(a)(9) because it compels mine operators to experiment with the lives and safety of miners required to operate oversized face equipment under canopies in coalbed heights that create an imminent danger of death or disabling injury from roof falls for all miners and of decapitation and dismemberment of equipment operators. The Commission held the bitter experience developed in the records of the modification cases was no basis for concluding that application of the improved standard "at all times and under all circumstances" diminishes the safety of the miners and therefore it must be conclusively presumed that the improved standard both as applied and generally is valid and does not "reduce the protection" of the miners.

There is also available for consideration a carefully crafted decision by Judge Steffey in which he found, after a full evidentiary hearing, that (1) canopies are not required where the coal height is less than 42 inches and (2) that the undisputed facts of record in his proceeding showed that as recently as March 10, 1980 practical technology did not exist to permit the installation of canopies in mining heights of 43 to 50 inches. Wright Coal Company, Inc., 3 FMSHRC 496 (1981). Because Judge Steffey's finding of technological impossibility was never challenged by either MSHA or the Commission it became by operation of law a final decision of the Commission.

A careful reading of the Comptroller General's report, supra, also leads me to conclude that up to 80 percent of the research, development and experimentation with canopy designs has been accomplished without any input on the part of the Secretary. The report further supports the view that this shifting of the burden has been counterproductive not only in terms of productivity but also of safety. As the report notes, "injury prevention benefits of cabs and canopies require further study." Attempts on the part of this judge to obtain such data has been very frustrating. In response to a subpoena for such data, counsel for the Secretary advised on April 7, 1981, that "there are no formal reports or studies reflecting the number of lives saved or injuries avoided by the use of cabs or canopies." Ltr. to Trial Judge from Stephen P. Kramer, Esq., Attorney for the Secretary. This admission leads me to regard MSHA's claims as to the efficacy of the canopy requirement with great skepticism.

The Commission in reversing my decision concluded inter alia, that in the absence of an evidentiary hearing or stipulation of facts the trial judge's finding that application of the canopy requirement would compromise the safety of the miners was impermissible. This is incorrect. What the Commission seems to have overlooked was that my decision was based solely on (1) the undisputed facts set forth in a final decision by the Secretary on a petition for modification or waiver of the canopy requirement with respect to the mine and equipment in question, Sewell Coal Co., No. M. 76-131, (April 27, 1971); 44 F.R. 44838 (August 17, 1979), and (2) the facts agreed upon, stipulated to and submitted by the parties in support of their joint motion for settlement. 3/

3/ In Co-op Mining, 2 FMSHRC 3475 (1980), the Commission held that where stipulated facts establish that no violation occurred, a motion for settlement should be denied. And in Olga Coal Co., 2 FMSHRC 2769 (1980), the Commission held that the trial judge has "the inherent authority to question whether, as a matter of law, a case before him presents a cause of action."

work spaces leave little room to attach these devices. One coal mine official told us that in the last 4 years, his mine experimented with 88 different canopy designs. He also said that the work required to install and test these canopies had substantially reduced productivity.

Other problems with using cabs and canopies in low coal are that they impair the machine operator's vision, restrict movement, and cramp and tire the operator. Thus, some mine managers have had to deal with worker resistance to the cabs and canopies, further hindering productivity.

Recognizing problems with installing cabs and canopies in low coal, MSHA suspended requirements for coal mines with 42-inch seams or less. Further, coal operators have received substantial Federal assistance in complying with cab and canopy regulation. MSHA has provided some technical assistance to mines to help them retrofit machines. For example, during 1973, the first year cabs and canopies were required, the Roof Control Group of MSHA's Pittsburgh Technical Support Center analyzed about 60 cab or canopy designs and 120 redesigns for coal mine operators and equipment manufacturers. The Bureau of Mines has also assisted operators and manufacturers to comply with cab and canopy regulations. The Bureau estimates that 20 percent of the total canopy designs now being used have come from this research.

While requiring cabs and canopies in low coal may have disrupted mining operations, it may also have reduced fatalities and disabilities due to roof collapse. However, an examination of available data suggests that the injury prevention benefits of cabs and canopies require further study. *Id.* at 61.

This report, from what appears to be a reliably objective source to the Congress of the United States, casts serious doubt on the Commission's finding that "sufficient practical technology" exists to support the conclusion that operators encounter no difficulty in retrofitting face equipment "in mining heights above 30 inches". 3 FMSHRC 1410. The record clearly shows that the requirement has been suspended at least in regard to mining heights below 42 inches for lack of practical technology. See also, the Secretary's Annual Report to Congress for FY 1978, at 11-12.

Serious conflict also exists within MSHA over the existence of practical technology for medium and low coal mines. A January 1981 Report of the United States Regulatory Council states that "while local MSHA officials have agreed that canopied equipment in coal seams under 50 inches is 'impractical' MSHA officials in Washington require continued experimentation" in seam heights below 50 inches. Cooperation and Conflict: Regulating Coal Production, Report of the U.S. Regulatory Council, January 1981, at 47.

The Commission found that the parties' stipulation was that (1) the use of a canopy on the roof bolter "had caused injuries to miners" and (2) "that technology to abate the violation (in the 50 inch coalbed or mining height) was in an experimental stage" at the time the citation was written on January 15, 1976. 3 FMSHRC 1413-14. The Commission found this fell short of an express judicial admission that compliance would diminish the safety of the miners and that an implied admission was negated by a finding by the Secretary (never cited or relied upon by the parties in their motion to approve settlement) that on and after October 1972 "sufficient practical technology" existed to warrant imposition of a general duty on coal operators to utilize such "practical technology" to design, fabricate and retrofit canopies on all face equipment used in coalbed or mining heights in excess of 30 inches. 3 FMSHRC 1410-13; Compare, Eastover Mining Co., 3 FMSHRC 1155 (1981), rev. granted, June 1981.

The Commission's reliance on the Secretary's finding that "an appropriate level of practical cab and canopy technology existed" on the date of the violation was, I respectfully submit, irrelevant to the question of whether a violation, in fact, occurred with respect to the specific roof bolter at issue. As the Commission concedes, the "improved" standard imposes only a duty to apply "existing practical technology". This obviously does not embrace "experimental" technology for, as the Commission held, "There is . . . no affirmative duty for research and development placed upon an operator in the cab and canopy standard." 4/ Id. at 1412. For these reasons, I believed the admission that the use of "experimental" technology had "caused injuries to miners" warranted the finding that compliance on the date of the alleged violation was technologically impossible under the existing state of the art of canopy design without diminishing the safety of the miners. This conclusion was furthered by the fact that, because the Secretary recognized the "difficulties" occasioned by the "experimental stage" of the canopy design art, the time for compliance was repeatedly extended to permit a decision on the operator's petition for modification or waiver which was filed before the citation issued.

Despite my reservations pertaining to the broad issues decided by the Commission, the case is now before me to decide another separate issue of major significance, the effect of a successful petition for modification on a pending enforcement proceeding. Because the Commission could find no "clear discussion of the interrelationship between the

4/ This, I understand, means an operator cannot be required to experiment with his own designs. Experimental technology is speculative, emerging or unproved technology. Practical technology is that which the empirical evidence shows to be proven safe for use in the mine environment.

factual issues in the enforcement proceeding (this proceeding) and those at issue in the modification case", Sewell Coal Company, No. M. 76-131, decided April 27, 1979, supra, it remanded the matter to afford the parties, and presumably the trial judge, an opportunity to address the issue of this interrelationship "in the context of the facts of this case", 3 FMSHRC 1413-15, and "for further proceedings consistent with this opinion", and with the Commission's recent decision in a companion canopy case, Penn Allegh Coal Co., 3 FMSHRC 1392 (1981).

In Penn Allegh, the Commission found that "the defense of diminution of safety" could not regardless of its merit, be raised in an enforcement proceeding unless the operator could show that the "enforcement proceeding was brought by the Secretary after the operator had filed a modification petition and before that petition had been finally resolved." 3 FMSHRC 1399, footnote 10. 5/

A comparison of the factual matters in the enforcement and modification proceedings establishes a firm basis for application of the principles of res judicata and collateral estoppel against the Secretary in the instant enforcement proceeding. Thus, the record that is before me and that was before the Commission shows:

I

Effective January 1, 1975, canopies were required whenever the coalbed height, height of the coal seam or mining height exceeded 48 inches. 30 C.F.R. 75.17101(a)(4). The first notice or citation issued under the Coal Act on January 15, 1976. It charged that the failure to install a canopy on a Galis 300 roof bolter in the 012 section, which at the time had a minimum mining height of 50 inches, constituted a violation of the improved standard. One day prior to issuance of the notice, i.e., on January 14, 1976, the operator filed a petition seeking modification or waiver of the requirement. Sewell Coal Co., supra, at 1. Thereafter, MSHA conducted an investigation of the operator's petition in April and October 1976 and in December 1978 filed and served a report of its findings and recommendations. Id.

5/ This exclusionary rule was first fashioned by OSHRC in October 1976 almost a year after the violations in question in this case allegedly occurred. A review of the record shows the Commission raised the issue sua sponte and that it was never raised or briefed by the parties. While two courts of appeals have endorsed the rule, three courts of appeals have appended qualifications to its application. Thus, in General Electric Co. v. Secretary, 576 F.2d 558 (3d. Cir. 1978), which the Commission cites, the Court held that the rule does not empower the Secretary to promulgate a standard that "increases the danger to employees", and that upon a showing in an enforcement proceeding that compliance (footnote 5 continued on next page)

When the parties failed to respond to the investigatory report, the Administrator for Coal Mine Health and Safety, MSHA, issued a proposed decision and order on April 27, 1979. Thirty days thereafter, no appeal having been noted, the proposed decision became final. 30 C.F.R. 44.16.

With respect to the 012 Section, the Administrator's decision found that "the mined height was 38 to 48 inches", the "roof was laminated shale supported by roof bolts", the "floor was uneven, steep, sideling and wet", and that the Galis roof bolting machine, with a frame height of 34 inches, was equipped with a canopy. Id. at 5. The Administrator further found that "for the Galis 300 roof bolting machine, there would be inadequate clearance to require the installation of a canopy except where the minimum mining height exceeds 48 inches." Id. at 9.

Based on these findings, which were undisputed, the Administrator concluded that the installation of a canopy on the Galis roof bolter would diminish the safety of the miners wherever the minimum mining height did not exceed 48 inches.

The Administrator's decision was published in the Federal Register on August 17, 1979. 30 C.F.R. 44.5. The parties' motion to approve settlement was filed on August 24, 1979.

Taking official notice of the Administrator's decision and more particularly his findings with respect to the undulations in seam height on the section in question, coupling this with the parties' representation as to the experimental nature of the technology, the hazards actually experienced, and MSHA's vacillation over whether the seam height was 55 inches, 50 inches, or 30 to 48 inches, and applying the accumulated expertise gained in hearing and deciding the difficult questions that

(footnote 5 continued)

will in all likelihood diminish rather than enhance the safety of workers enforcement must be stayed pending a determination of a petition for modification or waiver. 576 F.2d 561-562; Holtze Construction v. Marshall, 627 F.2d 149, 152 (8th Cir. 1980). In Holtze the court refused to pass on the propriety of the exclusionary rule because it was "not entrenched at the time" the matter was before the trial judge. To hold otherwise the court noted would require that the operator be afforded an opportunity to show that "the rules were changed to its prejudice in mid-course." 627 F.2d at 152, n. 2; Irwin Steel Erectors, Inc. v. OSHRC, 574 F.2d 222, 223-224 (5th Cir. 1978). In light of section 101(a)(9) of the Mine Safety Law the application of the exclusionary rule, developed under OSHA, to the Mine Act is questionable. However, if the exclusionary rule is to be applied to the defense of greater hazard under the Mine Act, the Secretary should also recognize that the granting of the modification mooted the charges and requires vacation of the citations. OSHRC did this in a case where the petition was filed after issuance of the citation. See, Star Textile and Research, Inc., 1974-75 OSHD, CCH ¶ 19,442.

attend the application of the science of anthropometrics to safe canopy design, I concluded that it was more probable than not that on January 15, 1976 it was technologically impossible to install a canopy that would not diminish the safety of the miners whether or not it was physically possible to fit a canopy on the roof bolter.

This, as I have indicated, was wholly without regard to whether the improved standard was valid or invalid. In fact, it was premised on the assumption that the improved standard was valid but that the diminution in safety made out on the record of the modification proceeding and in the parties' stipulations established a defense of "greater hazard". It is my tentative conclusion, therefore, that the defense of diminution of safety or greater hazard is available to the operator with respect to this enforcement proceeding and this violation.

II

The second citation involved in this enforcement case issued on April 26, 1978 under the Mine Act. It charged that the failure to install a canopy on a Joy 16SC shuttle car on the 014 section of the Sewell No. 1 Mine in a mining height of 43 inches constituted a violation of the improved standard. Effective January 1, 1977, canopies were required wherever the coalbed height, coal seam height or mining height exceeded 36 inches. 30 C.F.R. 75.1710-1(a)(5)(i). As noted, this section of the mine and piece of equipment was covered by the petition for modification or waiver filed some two and one-half years earlier, i.e., on January 14, 1976. Sewell Coal Co., supra, at 6. Thereafter, MSHA conducted an investigation and in April and October 1976 and in December 1978 filed and served a report of its findings and recommendations. Id.

When the parties failed to respond to the investigatory report, the Administrator for Coal Mine Health and Safety, MSHA, issued a proposed decision and order on April 27, 1979, thirty days thereafter, no appeal having been noted, the proposed decision became final. 30 C.F.R. 44.16.

With respect to the 014 Section, the Administrator's decision found that "the roof was shale supported with roof bolts and posts", the "floor was uneven, wet and steep with sideling places", the "mined height was 53 to 108 inches". The frame height of the shuttle car was 32 inches. It was not equipped with a canopy. The Administrator further found that "there is a minimum vertical clearance, between the frame of the equipment and the bottom of the roof supports, in excess of 18 inches for each piece of equipment on the section. I find this to be sufficient clearance for properly installed canopies without causing a diminution of safety to the operators of this equipment or to other miners." Id. at 10.

Based on these findings, which were undisputed, the Administrator concluded that the installation of a canopy on the shuttle car would not diminish the safety of the miners except where the minimum mining height does not exceed 48 inches. Id. at 13-14, Conclusions 3, 5. Accordingly, the Administrator ordered that the petition be denied, except where the mining height did not exceed 48 inches. Id. at 14, Order, Para. 3.

The Administrator's decision was published in the Federal Register on August 17, 1979. 30 C.F.R. 44.5. The parties motion to approve settlement was filed August 24, 1979.

The motion to approve settlement did not advise that the Administrator had granted a petition for modification on the piece of equipment involved but did stipulate that "no cab or canopy was commercially available for Respondent's use on a shuttle car working in 43-inch high coal".

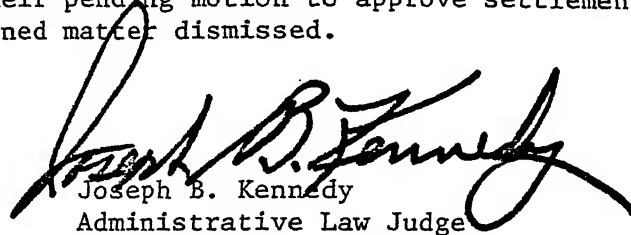
Based on the Administrator's uncontested findings and the stipulation of the parties, I concluded it was more probable than not that installation of a canopy on the shuttle car in question would have diminished the safety of the miners whether or not it was physically impossible to fit a canopy on the equipment.

This, as I have indicated, was wholly without regard to whether the improved standard was valid or invalid. In fact, it was premised on the assumption that the improved standard was valid but that the diminution in safety made out on the record of the modification proceeding and in the parties' stipulations established a defense of "greater hazard". It is my tentative conclusion, therefore, that the defense of diminution of safety or greater hazard is available to the operator with respect to this enforcement proceeding and this violation. 6/

6/ In a statement of enforcement policy dated June 29, 1981 (copy attached), MSHA has said that if a citation issues after a petition is filed the operator may petition for a stay under 30 C.F.R. 44.16. This permits an operator to file for a stay at any time prior to issuance of a final departmental decision on the petition. Where the citation issues before a petition is filed, the period of time for abatement may be extended until a decision has been rendered (1) where it is alleged in good faith that application of such standard will result in a diminution of safety to the miners, and (2) where, due to a particular circumstance, to force compliance with the standard would be unreasonable or impose an undue hardship upon the operator and adequate temporary measures have been taken to eliminate any hazards to miners.

The parties are entitled under the order of remand to an opportunity prior to any further order of dismissal "to present arguments addressing" the issue of the availability of the defense of diminution of safety in this case.

Accordingly, it is ORDERED that on or before Friday, October 16, 1981, the parties show cause why their pending motion to approve settlement should not be denied and the captioned matter dismissed.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Stephen P. Kramer, Esq., U.S. Department of Labor, Office of the Solicitor,
4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Fletcher A. Cooke, Esq., Sewell Coal Company, Lebanon, VA 24266 (Certified
Mail)

U. S. Department of Labor

Mine Safety and Health Administration
4015 Wilson Boulevard
Arlington, Virginia 22203

FEDERAL MINE SAFETY AND



JUN 29 1981

SEP 22 1981

HEALTH REVIEW COMMISSION

MSHA Policy Memorandum No. 81-22 C

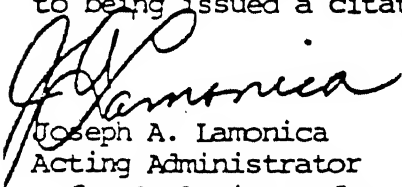
SUBJECT: Enforcement Policy When Coal Mine Operators Petition for
Modification Under Section 101(c) of the Act

Questions have been raised recently by district managers and enforcement personnel concerning MSHA's enforcement policy regarding mandatory safety standards when coal mine operators are in the process of petitioning for modification of a safety standard under Section 101(c) of the Act.

Operators will be required to comply with all mandatory safety standards even though the operator filed a request for modification under 30 CFR 44.10. Accordingly, a citation should be issued to the mine operator when not in compliance with any safety standard even though a decision on the petition is pending before the Administrator.

There are, however, two circumstances under which the period of time for abatement may be extended until a decision has been rendered. Those conditions are: (1) where it is alleged in good faith that application of such standard will result in a diminution of safety to the miners. For example, the safety standard for which modification is sought was filed under 30 CFR 75.305 alleging that certain return air courses in the mine are unsafe for travel due to adverse roof conditions; and, (2) where, due to a particular circumstance, to force compliance with the standard would be unreasonable or impose an undue hardship on the operator, and adequate temporary measures have been taken to eliminate any hazards to miners. For example, where an operator cannot comply with the provisions of 30 CFR 75.1105 since no return air course(s) is located within the immediate area of permanent pumps, and the operator proposes as an alternative method to install such pumps in a fireproof structure with additional safeguards. In those instances where a citation has been issued and the abatement time extended, the citation should be terminated if a favorable decision is rendered by the Administrator.

It should be noted that nothing precludes an operator from seeking interim relief from enforcement of any mandatory safety standard according to 30 CFR 44.16, prior to being issued a citation.


Joseph A. Lamonica
Acting Administrator

for Coal Mine Safety and Health

Inquiries: Joseph A. Woods, (703) 235-9745

Distribution: Principal Officials, Headquarters
District Managers, Coal
All Coal Mine Operators

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

State of Virginia, County of Fairfax, to wit:

I, Judith K. O'Rear, being first duly sworn, depose and say as follows:

Based on my independent memory and the contemporaneous notes I keep on all telephone conversations these are the true facts surrounding the Motion to Approve Settlement in the Sewell Co. case, WEVA 79-31.

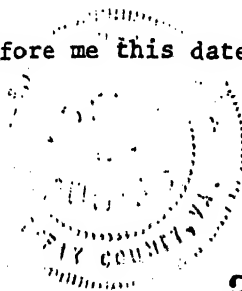
On August 12, 1981, I received a phone call from Mr. Fletcher Cooke, counsel for Sewell Coal Co. I had previously left a message for him to call me. I asked him whether the Sewell Coal case remanded by the Commission was going to be appealed by the company. He replied in the negative and informed me that he and the counsel for the Government were engaging in settlement discussions. He promised to inform me of the results of these discussions by August 14. On August 14, Mr. Cooke and Mr. Gresham told me that they had not yet spoken to company officials regarding a possible settlement, but that a tentative settlement had been reached with the Government, and they would advise the company to consider it. They were to advise me Monday, August 17 of the Company's position. On August 17, Mr. Gresham called to inform me that the parties were attempting to settle the case at \$25.00 per violation. He told me that Mr. Kramer was handling the case for the Government and that Mr. Kramer was preparing a motion to approve settlement.


On August 17, 1981, after talking to Mr. Gresham, I called Mr. Kramer for the first time. I asked Mr. Kramer if there were any developments in the Sewell case. He replied that he was going to resubmit a motion to approve settlement. He also mentioned an amount which agreed with that which counsel for the operator had previously supplied. I asked him when the motion would be submitted and he replied that the motion would be "out in the next couple of days." I specifically deny that I asked Mr. Kramer to file a motion superceding and replacing Mr. Street's motion, or suggested that he negotiate and prepare a motion for settlement of any kind. Insofar as Mr. Kramer's statement in paragraph 4 of the Government's response to the Order to Show Cause implies that I made such statements, he is either mistaken or misrepresenting the facts.


Judith K. O'Rear

Subscribed and sworn before me this date 30, October, 1981

State of Virginia
Fairfax County




Ilene B. McGeachy, Notary
Commission Expires 2, 6, 1981

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 9 1981

BECKLEY COAL MINING COMPANY,	:	Contest of Citation
Contestant/Applicant	:	
v.	:	Docket No. WEVA 81-436-R
	:	
SECRETARY OF LABOR,	:	Citation No. 876304
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	Application for Review
	:	
	:	Docket No. WEVA 81-500-R
	:	
	:	Order No. 887689
	:	
	:	Beckley Mine

DECISION

Appearances: Harold S. Albertson, Jr., Esq., Hall, Albertson & Jones, Charleston, West Virginia, for Contestant-Applicant; Catherine M. Oliver, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the notice of contest and application for review filed by the Beckley Coal Mining Company (Beckley) under sections 105(d) and 107(e), respectively, of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," challenging the validity of citations and an order of withdrawal issued pursuant to sections 104(a) and 107(a), respectively, of the Act. Hearings were held in Charleston, West Virginia, commencing August 18, 1981.

Docket No. WEVA 81-500-R

In this case, the Secretary moved at hearing to amend Order of Withdrawal No. 887689 to additionally incorporate therein a citation under section 104(a) of the Act. After hearings were held in the companion case (WEVA 81-436-R), Beckley moved to withdraw its application for review and contest of the combined withdrawal order and citation and provided adequate reasons therefore. That request was granted and accordingly the case captioned Docket No. WEVA 81-500-R was dismissed.

The issue in this case is whether a violation of the mandatory standard at 30 C.F.R. § 75.329 existed as alleged in Citation No. 876304. The citation reads as follows:

The bleeder system for the 1 panel off Chestnut Mains Section (029) was not adequate to reduce the methane concentration to below 2 per centum. Methane in excess of 2 per centum was present in the No. 37 crosscut as detected with a permissible G-70 methane detector located at a point not less than 12 inches from the roof, face or ribs.

In relevant part, the cited standard provides as follows:

* * * [a]ll areas from which pillars have been wholly or partially extracted and abandoned areas * * * shall be ventilated by bleeder entries or by bleeder systems or equivalent means * * *. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases.

30 C.F.R. § 75.329.

There is no dispute that the subject panel was an area from which pillars had been wholly or partially extracted and had been abandoned as a gob area. In determining whether a violation has occurred, the specific issue then is whether ventilation of the cited area was being maintained so as "continuously to dilute, render harmless, and carry away methane and other explosive gases" in that area and "to protect the active workings of the mine from the hazards of such methane and other explosive gases."

The results of the methane readings taken in the bleeder system for the subject panel by MSHA ventilation specialist Kenneth Ayers on June 25, 1981, are not contested. In four bottle samples taken by Ayers in the No. 37 crosscut 52 feet in by the left rib, the methane content was 2.71, 2.67, 2.74, and 2.73 percent. Readings showing more than 3 percent methane were also obtained by Ayers with his handheld methane detector in the same locations. All other areas of the bleeder system tested by Ayers, including the No. 38 and No. 39 crosscuts, showed methane concentrations of less than 2 percent. Ayers conceded that none of the methane levels actually found in the bleeder system were dangerous per se and that a concentration of 5 percent would be necessary before an explosive condition existed. He also recognized that concentrations of methane higher than found in the crosscuts would be expected to exist in the gob area.

Ayers testified at one point that he was unable to detect any perceptible movement of air in the No. 37 crosscut where he found the highest concentrations of methane. He later testified, however, that the air movement was "minimal" and opined that "an anemometer would not have turned" in that crosscut. Regardless of his reasons, it is clear that he did not in fact conduct any smoke tube or anemometer tests to confirm air movement or the absence thereof. Within this framework, Inspector Ayers concluded that if the condition was left unabated, an accumulation of methane was "very possible" in the cited area and that it was not likely that the condition would have corrected itself.

Eugene Brown, Beckley's safety inspector, accompanied Ayers on his inspection. He disagreed with Ayers' evaluation of the air movement in the No. 37 crosscut. Brown testified that he actually felt the movement of air in the crosscut but was unable at that time to perform any smoke tube or anemometer tests because the equipment was not readily available. The next day, however, after removing a line curtain to reconstruct the scene in the No. 37 crosscut as it had existed when the citation was issued, Ronald Scaggs, Beckley's director of safety and training, and Brown conducted a smoke tube test. The released smoke moved out of the crosscut and into the bleeder. They also extended a probe with a methane detector into the same general area close to the gob in which Ayers had the day before found 3 percent methane. They obtained similar readings and some even in excess of 3 percent. Near the mouth of the No. 37 crosscut on the other hand, they found only low-level readings of around 1 percent methane. They concluded based on all the evidence that the relatively high methane concentrations in excess of 3 percent near the gob area were in fact being diluted into the bleeder system on June 26 in the same manner in which they were being diluted on June 25 when the citation was issued.

Whether there was a violation of the cited standard here depends on the adequacy of the ventilation system, not, as charged in the citation, solely upon the levels of methane found in any particular crosscut. The level of methane in the cited crosscut is only one of many factors to consider in determining whether a violation existed. The test set forth in the standard is whether the ventilation system is being "maintained so as continuously to dilute, render harmless, and carry away" the methane that both parties recognize is going to emanate from the gob area. It is therefore essential to know in this case whether such ventilation was being maintained in that part of Beckley's bleeder system here cited, i.e., the No. 37 crosscut. In this regard, the clear preponderance of the evidence does not support the alleged violation. Essentially the only evidence produced to suggest the inadequacy of the ventilation system here in effect was the one-time series of methane readings showing a non-explosive 2- to 3-percent concentration and the opinion of Inspector Ayers that there was "no perceptible" movement of air out of the cited crosscut. However, since Ayers himself later conceded that there was some air movement (though minimal) out of the crosscut, since he failed to support his earlier conclusion of "no perceptible" air movement with a smoke tube test or anemometer reading, and since Safety Inspector Brown testified that there was indeed movement of air out of the crosscut

at that time, I find it more credible that there was indeed movement of air (and methane) out of the No. 37 crosscut when the citation was issued. I also find credible the tests performed by Brown and Scaggs on the following day under conditions substantially similar to those when the citation was issued from which it may be inferred that methane from the gob area was indeed being diluted, rendered harmless, and carried away at that time as well as when the citation was issued. Accordingly, I find that there has been no violation of the standard as cited.


ORDER

Docket No. WEVA 81-436-R

Citation No. 876304 is VACATED and the contest is GRANTED.

Docket No. WEVA 81-500-R

The application for review and contest are DISMISSED.


Gary Melick
Administrative Law Judge

Distribution:

Harold S. Albertson, Jr., Esq., Hall, Albertson & Jones, P.O. Box 1989,
Charleston, WV 25327 (Certified Mail)

Catherine M. Oliver, Esq., Office of the Solicitor, U.S. Department of
Labor, 14480 Gateway Building, 3535 Market Street, Philadelphia, PA
19104 (Certified Mail)

Harrison Combs, Esq., United Mine Workers of America, 900 15th Street,
NW., Washington, DC 20005 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 10 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 81-46-M
Petitioner	:	A/O No. 19-00724-05005
v.	:	
	:	Action Plant
KENNEDY BROTHERS ACTON	:	
SAND & GRAVEL,	:	
Respondent	:	

DECISION

Appearances: David A. Snyder, Esq., Office of the Solicitor,
U.S. Department of Labor, Boston, MA for Petitioner,
MSHA;
John O. Mirick, Esq., Mirick, O'Connell, DeMallie
& Lougee, Worcester, MA for Respondent, Kennedy
Brothers Acton Sand & Gravel.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the government against Kennedy Brothers Acton Sand & Gravel. A hearing was held on October 13, 1981.

At the hearing, the parties agreed to the following stipulations:

- (1) The operator is small in size (Tr. 6).
- (2) The operator's history of previous violations is small (Tr. 6).
- (3) The imposition of penalties will not affect the operator's ability to continue in business (Tr. 6-7).
- (4) The alleged violations were abated in good faith (Tr. 9-10).
- (5) The conditions or practices specified in the citations issued by the inspector existed as described by the inspector (Tr. 14-15).

Because the parties have entered into stipulations concerning the existence of the violations, the operator's size, the operator's history of previous violations, the operator's ability to continue in business

despite the imposition of penalties, and the operator's good faith abatement of the violations, I only need to consider the degree of the operator's negligence and the level of gravity of the violation in order to determine an appropriate penalty for each citation.

Citation No. 216841

This citation was issued when the inspector observed an inadequate guard on a tail pulley, a violation of 30 C.F.R. 56.14-3. I found that gravity was moderate; and that negligence was ordinary. Accordingly, I assessed a penalty of \$50, which I felt was consistent with other penalties I have assessed in this situation (Tr. 16).

Citation No. 216842

This citation was issued when the inspector observed an inadequate guard at the tail pulley for the number belt conveyor, a violation of 30 C.F.R. 56.14-3. I found that gravity was moderate; and that negligence was ordinary. Accordingly, I assessed a penalty of \$50, which I felt was consistent with other penalties I have assessed in this situation (Tr. 18).

Citation No. 216843

This citation was issued when the inspector observed that there was no stop device or guard rail along the lower section of the No. 1 belt idlers, a violation of 30 C.F.R. 56.9-7. I found that gravity was moderate; and that negligence was ordinary. Accordingly, I assessed a penalty of \$90 (Tr. 20).

Citation No. 216844

This citation was issued when the inspector observed an inadequate guard on a V-belt for the primary crusher. At the hearing, both parties agreed to amend the citation from section 56.14-3 to section 56.14-1 (Tr. 20). I found that gravity was moderate; and that negligence was ordinary. Accordingly, I assessed a penalty of \$50, which I felt was consistent with other penalties I have assessed in this situation (Tr. 20).

Citation No. 216845

This citation was issued when the inspector observed that no guard was provided over the head pulley for the return conveyor, a violation of 30 C.F.R. 56.14-1. I found that gravity was moderate; and that negligence was ordinary. Accordingly, I assessed a penalty of \$114, which was the amount recommended by the parties (Tr. 22).

Citation No. 216846

This citation was issued when the inspector observed that no guard was provided over the takeup rolls on the No. 3 sand conveyor, a violation of 30 C.F.R. 56.14-1. I found that gravity was moderate; and that negligence was ordinary. Accordingly, I assessed a penalty of \$114, which was the amount recommended by the parties (Tr. 23).

Citation No. 216847

This citation was issued when the inspector observed an inadequate guard on the balance wheel on the left shaker screen. At the hearing, both parties agreed to amend the citation from section 56.14-3 to section 56.14-1 (Tr. 23). I found the level of gravity was low because in the opinion of the inspector an injury due to this violation would result in lost work days or restricted duty rather than the permanent disabling injury that would result from any of these other violations. I further found negligence was ordinary. Accordingly, I assessed a penalty of \$45 (Tr. 25).

Citation No. 216848

This citation was issued when the inspector observed that safe access was not provided to the head pulley bearings on the outer side of the No. 4 stacker conveyor belt, a violation of 30 C.F.R. 56.11-1. I found that gravity was moderate; and that negligence was ordinary. Accordingly, I assessed a penalty of \$120 (Tr. 27-28).

Citation No. 216849

This citation was issued when the inspector observed that no guard was provided over the return idlers on the No. 3 conveyor belt, a violation of 30 C.F.R. 56.14-1. I found that gravity was moderate; and that negligence was ordinary. Accordingly, I assessed a penalty of \$114, which was the amount recommended by the parties (Tr. 28).

ORDER

The operator is ORDERED to pay \$747 within 30 days from the date of this decision.


Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

David A. Snyder, Esq., Office of the Solicitor, U.S. Department of Labor, John F. Kennedy Federal Bldg., Government Center, Boston, MA 02203 (Certified Mail)

John O. Mirick, Esq., Mirick, O'Connell, DeMallie & Lougee, 1700 Mechanics Bank Tower, Worcester Center, Worcester, MA 01608 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 12 1981

BERALDO GRIJALVA,	)	COMPLAINT OF DISCHARGE,
	)	DISCRIMINATION OR INTERFERENCE
Complainant,)	
	)	DOCKET NO. WEST 81-255-DM
v.)	
	)	MSHA CASE NO. MD 78-58
ORACLE RIDGE MINING PARTNERS,)	
)	
Respondent.)	

DECISION AND ORDER

Appearances:

Beraldo Grijalva
P.O. Box 374
Marana, Arizona 85238
Pro Se

Stephen Pogson, Esq.
363 North First Avenue
Phoenix, Arizona 85003
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

Pursuant to a notice of hearing dated August 31, 1981, a hearing in the above-entitled proceeding was held in Tucson, Arizona, on October 6, 1981.

At the hearing, the complainant, appearing with his son, stated that he had contacted an attorney several weeks prior to the hearing and had expected the attorney would represent him, however the attorney was not present.

Further inquiry revealed that the complainant had contacted an attorney and given him the various documents related to this matter to review. These documents included the Notice of Hearing which set forth the date and time of the hearing. The attorney was to contact the complainant but failed to do so. During a recess of the hearing, complainant learned that the attorney was attending another hearing and would not be available for this matter. The complainant was advised that he could proceed on his own, but he stated that he did not wish to proceed and wished to drop the case. (Tr. 11).

The respondent's attorney argued that the complainant had been given adequate notice of the date, time and place of the hearing and that the attorney was also aware of the hearing. Counsel for respondent stated that he was prepared to proceed at that time.

FINDINGS OF FACT

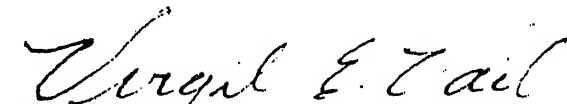
Having considered all of the circumstances involved, I make the following findings:

1. That the complainant had sufficient notice of the date, time and place of this hearing.
2. That the complainant contacted an attorney on one occasion but failed to re-contact him prior to the hearing and therefore made insufficient effort to determine if the attorney would represent him or attend the hearing.
3. That no notice of appearance was made by an attorney in this matter on behalf of the complainant.
4. That the complainant was afforded an opportunity to proceed on his own in this matter, but stated he wanted to drop the case.
5. That the respondent's attorney was in attendance and was prepared to call witnesses and present evidence.
6. That considerable time and expense was incurred in setting and attending this hearing and it would be a hardship on the respondent to continue the matter to a later date.

ORDER

I hereby accept the complainant's statement that he wished to drop the matter and not proceed further as a motion to dismiss.

Accordingly, it is ORDERED that complainant's motion be GRANTED and the case DISMISSED WITH PREJUDICE.



Virgil E. Vail
Administrative Law Judge

Distribution:

Beraldo Grijalva
P.O. Box 374
Marana, Arizona 85238

Stephen Pogson, Esq.
363 North First Avenue
Phoenix, Arizona 85003

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

NOV 13 1981

WILLIAM C. McCLAIN, : Complaint of Discharge,
Complainant : Discrimination or Interference
v. :
WESTMONT COAL COMPANY, INC., : Docket No. PENN 81-162-D
Respondent : PITT CD 81-9

DECISION

Appearances: James T. Davis, Esq., Davis & Davis, Uniontown,
Pennsylvania, for Complainant;
Robert A. Kelly, Esq., Cauley, Birsic & Conflenti,
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon a complaint filed under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" alleging that William C. McClain was suspended by Westmont Coal Company, Inc. (Westmont) in violation of section 105(c)(1) of the Act. 1/ An evidentiary hearing was held on McClain's complaint in Pittsburgh, Pennsylvania, commencing September 8, 1981.

1/ Section 105(c)(1) of the Act provides as follows:

"No person shall discharge or in any manner discriminate against or caused to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or any mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluation and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

Mr. McClain can establish a prima facie violation of this section of the Act if he proves by a preponderance of the evidence that he has engaged in an activity protected by that section and that the disciplinary action against him was motivated in any part by that protected activity. Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd. on other grounds, Consolidation Coal Company v. Secretary of Labor, No. 80-2600 (3d Cir., October 30, 1981). He alleges as protected activity his participation in the union safety committee and, in particular, his filing in this capacity of six safety complaints against Westmont. Westmont does not dispute that these activities are protected within the scope of section 105(c)(1), but contends that the disciplinary action taken against McClain was not motivated in any part by those activities. ^{2/} Westmont maintains that this disciplinary action was solely the result of McClain's misconduct on January 6, 1981, in shooting a deer on neighboring property, out of season, during the period of his work shift, and while using a company pickup truck. For the reasons that follow, I find that McClain has failed to sustain his burden of proving that the disciplinary action taken by Westmont was motivated in any part by his protected activities.

Since there is no dispute that McClain engaged in protected activities, the essential question to be decided is whether McClain has sustained his burden of proving that the disciplinary action taken against him was motivated in any part by those activities. Pasula, supra. As evidence of vindictiveness (and presumably motivation to unlawfully discipline him), McClain first points out that he issued three safety complaints on union-furnished forms to Westmont on September 9 and 10, 1980. McClain alleges that Andrew Hynick, then mine superintendent, declined to sign for the complaints and refused to accept a copy. There is no allegation that Hynick was obliged in any way to perform these acts and Hynick testified that he was fully aware of the substance of the complaints and had the cited problems corrected. According to Hynick, he declined to sign the written complaints because McClain had failed to follow customary procedures to approach him first with an oral complaint.

As further purported evidence of unlawful motivation, McClain contends that beginning in October 1980, and continuing the next 2 months, on "numerous" occasions he requested that Mr. Hynick arrange to have a "40-hour safety course" presented. McClain alleges that his persistence in seeking to have that course presented irritated Hynick to such an extent that it resulted in his discharge on February 24, 1981. Hynick testified, on the other hand, that he recalled being approached about the course only once and presumably, therefore, did not find it particularly irksome. The safety training was in fact presented in due course during the week of January 19, 1981.

^{2/} McClain was discharged by Westmont by letter dated February 1981. That action was modified, however, at arbitration proceedings and McClain was ordered reinstated but suspended without pay from February 27, 1981, to March 27, 1981, for his unlawful deer hunting activities described, infra. It is that suspension that is at issue herein.

McClain next contends that following an inspection by mine safety committee members on February 2, 1981, he, as a member of that committee, reported a number of safety violations to the company, including what the committee deemed to be an imminent danger regarding abandoned auger holes. McClain testified that the company was accordingly required to take immediate corrective action requiring the temporary transfer of equipment and men from production work. He also mentions a complaint that the mine safety committee filed with the company as a result of a purported explosion near working employees on February 7, 1981. McClain presumes that these too were sources of ill will toward him.

While each of these four incidents cited by the Complainant as protected activities could theoretically provide a basis for an unlawful motive, there is insufficient evidence to show any causal connection between the incidents and the disciplinary action. I find the first two incidents cited to be particularly trivial and hardly of a nature likely to give rise to the serious discriminatory response alleged. The possibility of a causal relation is made even more remote by the lapse of time--nearly 6 months between the first incident and McClain's initial discharge. Although the latter two incidents cited are of a more serious nature, no explanation is given as to why other members of the mine safety committee and the chairman of that committee did not suffer discrimination. It appears that they were equally responsible (the chairman even more so) for the safety complaints but there is no evidence that any one of these miners was singled out for any discriminatory treatment. Indeed, the only factor distinguishing McClain from these other committeemen is his admitted unlawful deer hunting. In short, I find that the Complainant has simply failed in his burden of proving that the operator was motivated in its discipline of him by any of the protected activities.

As other evidence of vindictiveness, McClain cites the testimony of former co-worker Roland Sterbetzel. Sterbetzel testified that in September 1980, he overheard a conversation between Superintendent Hynick and an employee named Roll. From what he was able to overhear, he concluded that Hynick wanted to have Roll engage McClain in a fight in order to "get rid of him because of his union activities." According to Sterbetzel, Roll disliked McClain and had apparently complained about him in the past in efforts to get McClain fired. Roll did not appear at the hearing. Hynick testified that what actually happened was that Roll approached him and offered to get into a fight with McClain so that McClain could be fired. Hynick testified that he paid no attention to Roll's offer and walked away without responding. There is no evidence that Roll ever did engage McClain in a fight and no evidence that McClain's "union activities" related to any activity protected by the Act. I find in any event that Hynick's version of the conversation to be the more credible and reliable. On the one hand, Sterbetzel had merely "overheard" the conversation or part thereof and accordingly it is not unlikely that he obtained an inaccurate understanding of it. On the other hand, the reliability of Hynick's testimony is assured by the fact that he was a direct participant in the conversation. The failure of the Complainant to support his version of the conversation by calling the other direct participant as his witness must also be considered.

Even if it could be argued that Westmont was motivated in part by Complainant's protected activities, there is ample evidence from which it may be concluded that it would have disciplined him in any event for his unprotected activities alone. Pasula, supra. Westmont asserts herein that its action was solely the result of McClain's willful misconduct in violating Pennsylvania law and company policy in shooting a deer out-of-season on neighboring property and while using a company vehicle to aid in the accomplishment of this act during the period of his regular working shift. As a result of such misconduct, McClain subjected Westmont to potential civil and criminal liability and created a potentially damaging source of ill will with adjacent property owners and State officials. Moreover, if Westmont permitted such employee misconduct without appropriate sanctions, it could seriously erode its ability to meet legitimate management responsibilities.

At the time of the incident, McClain had been employed by Westmont at its coal strip mining operation for almost 3 years. He had been working as a bulldozer operator but on January 6, 1981, he was working the 5 a.m. to 12 noon shift as an oiler for the dragline. Shortly before 9 that morning, he drove a company truck to the fuel depot about one-half mile from the dragline. At the depot, he unloaded several barrels, picked up some rags and parts as well as his lunch bucket and a loaded rifle from his car. He claims that he intended to show the rifle to another employee who was interested in purchasing a gun. While returning to the dragline, he spotted a deer crossing the road. He claims that he was on the haulage road about 20 yards from the public township road when he actually shot the deer. He dragged the deer to the truck and transported it to the dragline where he removed it, gutted it and returned to work. He claims that only 20 to 25 minutes had elapsed from the time he shot the deer until he completed gutting it. He further alleges that he did not eat his lunch during that shift and considered that period as his lunch time.

After his shift, at around 12:25 p.m., a Pennsylvania State game warden questioned him. McClain admitted shooting the deer and turned the still loaded gun over to the warden. He had hidden it on the dragline during the remainder of his shift. McClain subsequently paid \$200 in fines for violations of State game laws and lost his hunting license for 3 years.

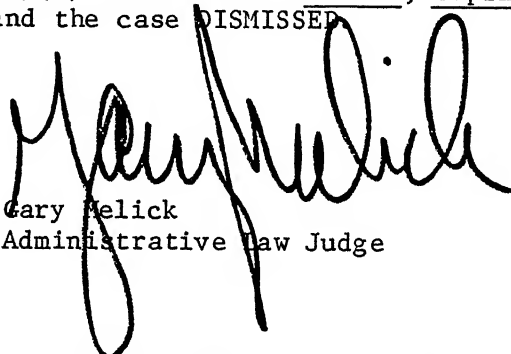
Only one deer was shot that day in the vicinity of the haulage/township road and the credible evidence presented at the hearing shows that that deer had been shot on the private property of Joan Waldron, who lived adjacent to the Westmont Mine. Another neighbor, Allen Wiltrout, described the spot where the deer had been shot, dragged out, and loaded onto a truck. Since the deer had apparently been shot out-of-season he had his daughter call the game warden. Wiltrout later accompanied two of the wardens as they pursued their investigation. They discovered the company pickup truck at the dragline and found blood and hair from the deer still in the truck. According to Wiltrout, the Westmont property line was clearly marked in that area by a fence line that separated the township road from the company haulage road.

On January 7, 1981, the day after the deer was shot, John Aloe, Westmont's president, received a phone call from Joan Waldron. According to Aloe, she

was frantic, speaking in a high-pitch crackling voice. She was obviously upset. Ms. Waldron reported that a Westmont employee had been poaching on her property and wanted to have that employee transferred. Aloe thereupon began an investigation to find the responsible employee. After much effort, Superintendent Hynick finally succeeded in obtaining McClain's name from state officials. As a result, on February 19, 1981, McClain was issued a notice of disciplinary action.

Within this framework of evidence, I conclude that Westmont was indeed justified in taking disciplinary action against McClain and that it acted on the basis of his unprotected activities alone. McClain himself has conceded that he showed bad judgment. While he also produced evidence that previous mine management had permitted the carrying of guns onto Westmont property for the purpose of deer hunting on the property during hunting season, he produced no evidence to suggest that Westmont had ever permitted the use of company vehicles to further any deer hunting, the secreting of loaded weapons on company equipment, shooting deer during the employee's shift, hunting on neighboring property, or hunting out of season.

Under all the circumstances, I find that McClain has failed to sustain his burden of proof under section 105(c)(1) of the Act. Pasula, supra. The complaint herein is therefore DENIED and the case DISMISSED.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 13 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 81-23-M
Petitioner : A/O No. 17-00493-05001 EJ6
v. :
Beckler Pit & Mill
RICHARD A. DOUGLASS & SONS, :
Respondent :

DECISION

Appearances: David L. Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for the Petitioner;
David W. Austin, Esq., Rumford, Maine, for the Respondent.

Before: Judge Cook

I. Procedural Background

On January 16, 1981, the Mine Safety and Health Administration (Petitioner) filed a proposal for assessment of civil penalties in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The proposal alleges 11 violations of provisions of the Code of Federal Regulations. On February 4, 1981, an answer was filed by Richard A. Douglass & Sons (Respondent). A hearing was held on September 24, 1981, in Augusta, Maine, with representatives of both parties present and participating.

II. Proposed Settlement

During the course of the hearing, both parties proposed a settlement. The amount of the original proposed assessment is identified as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Assessment</u>
00200203	07/01/80	56.14-1	\$ 52
00200204	07/01/80	56.14-1	52
00200205	07/01/80	56.14-3	44
00200206	07/01/80	56.14-1	44

00200207	07/01/80	56.14-1	52
00200208	07/01/80	56.9-7	34
00200209	07/01/80	56.9-7	34
00200210	07/01/80	56.14-1	52
00200211	07/01/80	56.14-1	34
00200212	07/01/80	56.14-1	34
00200213	07/01/80	56.14-1	34
Total proposed assessment:			<u>\$466</u>

The proposed settlement is identified as follows:

Vacate Order Nos. 00200204 - \$52
 00200207 52
 00200210 52

Amount proposed to be paid in settlement - \$300.

In support of the proposed settlement, the parties stated as follows at the hearing:

JUDGE COOK: What is the status now? There have been many stages, apparently, that this settlement discussion has been going through, but what is your present status?

MR. BASKIN: Well, counsel for the Respondent contacted me--I believe it was the day before yesterday--your Honor, and said that his client was willing to settle the case for a lower amount of money, and we reached an agreement between ourselves of \$300, and the original penalty assessment is \$466. We would like to submit our \$300 settlement for the Court's consideration. It is certainly the Secretary's belief that settlement at this lower amount is consistent with the purposes of the Act and there is every reason why it ought to be approved. I can get more specific, if the Court desires, your Honor.

JUDGE COOK: Well, now, could you specify particularly as to each of these charges what particular amount you had agreed upon.

MR. BASKIN: We haven't agreed on specific amounts, your Honor. What I would like to do, your Honor, is point out something to you, if I could. I think this is one of the justifications for settlement, although Mr. Douglass--the fact that Mr. Douglass is a small operator and doesn't have a great deal of cash flow is also a definite factor in this case.

I would like to point out to the Court that we have Citations in this case whose numbers are all 2000, 002, 0020, and then they go three, four, five, six, seven, eight, nine, ten, eleven, twelve, and thirteen, so I am going to just refer to the last two digit numbers for convenience, your Honor.

JUDGE COOK: Yes.

MR. BASKIN: We have Citations No. 4 and 11, your Honor, that both pertain to an area on the one and a half inch film conveyor. Now, 4 and 11, 4 pertains to the unguarded tail pulley, and 11 pertains to unguarded return idlers, and in the way the small crushing unit works, these areas are very close together, from 2 to 4 feet. It is what you would say, it is in the same place. There was lack of guarding in the same place, but two unguarded pinchpoints.

The point is that we have an area that is pretty much the same. The same thing is true with Citations 7 and 12, your Honor; they have one unguarded tail pulley on a conveyor under a screen, a crushing screen, and you have the same unguarded idlers in that area. Again, it is very close together.

With Citations 10 and 13, your Honor, you have an unguarded tail pulley on a return conveyor. You have an unguarded return idler on the same return conveyor.

I would like to make the Court aware of an MSHA memorandum that was dated October 3, 1979, and it is from Thomas Shepard [sic], who [was] then the Administrator for metal and nonmetal mine safety and health; the subject was Citations and orders citing multiple violations.

The third paragraph of that he says that where there is multiple violations, the same standard we are talking about, here 29 CFR [56.14-1], standards which were observed in violation involving the same piece of equipment or the same area of the mine should, and I emphasize the should and it is a discretionary thing, but we are willing to put it into effect in this case, should be treated as one violation and one citation should be issued.

What I am saying here is that we got six citations that could easily be treated as three citations. We would be very happy to amend the Complaint that way.

Now, I want to point out to the Court, for instance, that for Citation 4, we have a \$52 assessment. Citation 11

we have \$34. For Citation 7, we have \$52. assessment, and for Citation 12, \$34. For Citation 10, \$52. For Citation 2, \$52. For Citation 13, \$34. In each case we would combine the Citations, we would modify it, and wipe out the \$52 citation. So we wipe out the 3 \$52 citations with a reduction in the penalty of \$156 down to \$310. Then quite frankly, to round it off, take into consideration Mr. Douglass not to great financial strength, we simply want to cut down the other \$10 to the \$300, which his counsel has agreed to pay. We think that the reasons for modifying the citations are, one, that we have the discretion to do it; secondly, the man is just not super wealthy, like Peabody Coal Co. So, I would appreciate it if the Court would consider the agreement in that context. I would like to state that we have agreed, counsel and I have agreed, that he pay in installments. There is a \$300 penalty to be paid in \$100 every month for three months. This company shouldn't have to pay \$300 in one month. I don't know, but it would put a dent in his personal finances. There is no reason to make it all at once.

JUDGE COOK: Now, Mr. Austin, what is your position on this?

MR. AUSTIN: Thank you. My position is the same as my colleagues. It is something that we have agreed to after discussing it, and we were in hopes of reaching an agreement and presentation to the Court, and I would concur with what he recommends.

JUDGE COOK: Very well. Now, before we conclude it then, Mr. Baskin, how did you want to handle the matter that you suggested of making some motion concerning three of the charges? How did you want to handle that?

MR. BASKIN: Well, to put it in perspective, I would move, your Honor, that Citation No. 4 be vacated and that Citation No. 11 be modified to refer to lack of guarding not only at the return idler, but at the tail pulley on the one and a half in conveyor belt. With respect to Citation Nos. 7 and 12, I would move for vacating on Citation No. 7 and modification of Citation No. 12 to state there was lack of guarding not only at the return idler but also at the tail pulley on the conveyor belt under the washing screen. With respect to Citations No. 10 and 13, we would move that Citation No. 10 be vacated and that Citation No. 13 be modified to refer to lack of guarding not only at the return idler but at the tail pulley on the return conveyor.

In each case, the penalties attached to the vacated citation would be wiped out, cancelled, if you will, and the \$34 penalty for the remaining citations be retained.

JUDGE COOK: Very well, now, what is your position as to that motion, Mr. Austin?

MR. AUSTIN: I would also concur in that, your Honor.

JUDGE COOK: Very well. Then I will grant that motion.

MR. BASKIN: Thank you, your Honor, I appreciate that.

JUDGE COOK: And I will approve the settlement then at the \$300 figure as agreed to by both parties.

MR. BASKIN: Do you want anything in writing, your Honor, or just on the record?

JUDGE COOK: This is adequate. If you did want to do anything else in writing, that is your privilege but is on the record here, and the transcript, of course, will be the basis upon which I will later issue a decision approving the settlement, and, of course, the motion to vacate those citations.

MR. BASKIN: Thank you. Will your order include, please, and order the Respondent to pay the penalty in \$100 installments over three months for a total of \$300. Send it to the Mine Safety & Health Administration, Attn. [Madison McCulloch] Director of the Office of Assessments, MSHA, 4015 [Wilson] Blvd., Arlington, VA [22203.] That should be paid on November, December and January first, if your Honor, please.

JUDGE COOK: Very well. I will also include that order in mine.

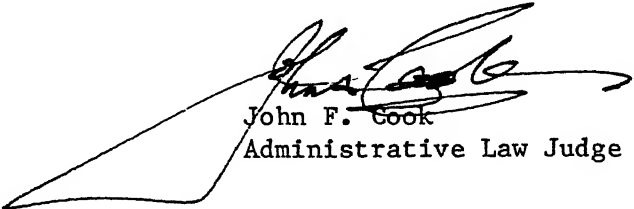
(Tr. 3-8).

The reasons given above by counsel for the Petitioner for the proposed settlement have been reviewed in conjunction with the information submitted as to the statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay one-third of the agreed-upon penalty of \$300 assessed in this proceeding, and that it thereafter pay one-third of such penalty within 60 days of the date of this decision and the remaining one-third of such penalty within 90 days of the date of this decision. Such payment is to be forwarded to Madison McCulloch, Director of the Office of Assessments, Mine Safety and Health Administration, 4015 Wilson Boulevard, Arlington, Virginia 22203.



John F. Cook
Administrative Law Judge

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Administrator for Metal and Nonmetal Mine Safety and Health,
U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor,
Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 16 1981

MATHIES COAL COMPANY,	:	Contest of Citation
	:	
Contestant	:	
	:	
v.	:	Docket No. PENN 81-213-R
	:	Citation No. 1050312; 7/10/81
SECRETARY OF LABOR,	:	
	:	
Respondent	:	Mathies Mine

DECISION

Appearances: Jerry F. Palmer, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant;
James P. Kilcoyne, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by Mathies Coal Company (hereinafter Mathies) on July 21, 1981, by the filing of a notice of contest of Citation No. 1050312 issued by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (hereinafter "the Act"). Also on July 21, 1981, Mathies filed an application for temporary relief from the above citation and a motion for expedited hearing on the notice of contest. On August 4, 1981, I issued an order granting the motion for expedited hearing and denying the application for temporary relief.

A hearing was held on the above matter in Pittsburgh, Pennsylvania on August 27, 1981. Francis E. Wehr, Sr., and Joseph Garcia testified on behalf of MSHA. William Porter and George Kostelnik testified on behalf of Mathies. At the hearing, Mathies renewed its motion for interim relief requesting that the Secretary of Labor be prevented from enforcing the escapeway regulations pending the outcome of this decision. Noting that to prevent enforcement of the safety regulation would possibly affect the health and safety of the miners, I found that Mathies had not satisfied its burden under Rule 46, 29 C.F.R. § 2700.46. I further found that Mathies was using this application as a means to avoid the process of seeking and obtaining a bypass variance. I, therefore, denied Mathies' application for temporary relief.

ISSUE

Whether Mathies violated 30 C.F.R. § 75.1704-2(a).

APPLICABLE LAW

30 C.F.R. § 75.1704-2(a) provides as follows:

In mines and working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with § 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts.

STIPULATIONS

The parties stipulated as follows:

1. Mathies Coal Company is the owner and operator of the subject mine.
2. The operator and the mine are subject to the 1977 Act.
3. The Administrative Law Judge has jurisdiction over the parties and the subject matter of this controversy.
4. The inspector who issued this citation was a duly authorized representative of the Secretary of Labor.
5. A copy of the citation is authentic and was properly served upon the operator.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. On July 10, 1981, MSHA inspector Francis E. Wehr issued Citation No. 1050312 for a violation of 30 C.F.R. § 75.1704-2(a) in that the Linden intake escapeway was bypassed while the Linden Portal elevator was inoperable due to electrical problems. The citation alleged that instead of withdrawing its miners from the affected area, the operator redesignated the intake escapeway to the Kerr intake shaft which was not the nearest mine opening suitable for the safe evacuation of miners.
2. Linden Portal was opened in September 1980, after the effective date of section 75.1704-2(a).

3. Prior to the development of the Linden Portal, the approved escape-way plan for the working sections 21 Face, 25 Face, West Mains and 1 South off West Mains, provided that the intake escapeway go to Thomas Portal while the return escapeway be routed to Kerr Fan.

4. After Linden Portal went into operation, the approved escapeway plan provided that the intake escapeway go to Linden Portal and the return escapeway go to Kerr Fan.

5. The safest direct practical route from the above working sections is to Linden Portal which is the nearest mine opening suitable for the safe evacuation of miners.

6. On July 9, 1981, the Linden Portal was shut down due to electrical problems with its elevator.

7. On July 9, 1981, while the Linden Portal was closed, the miners were not withdrawn from the affected area. The workers were directed to alternative escapeways which were not approved as being the nearest mine opening suitable for the safe evacuation of miners.

8. Mathies did not receive permission from the MSHA District Manager to bypass the Linden Portal when it became inoperable.

DISCUSSION

Mathies' primary contention in challenging the validity of this citation centers upon its assertion that section 75.1704-2(a) does not apply to Linden Portal. Linden Portal, one of seven escapeways at Mathies Mine, was opened in September, 1980. The safety and health standard at issue was promulgated October 31, 1973. See 38 Fed. Reg. 30000. Mathies determined that the safety standard does not apply to Linden Portal because of the policy statements contained in the MSHA underground manual. The manual states in pertinent part:

The term "mine opening suitable for the safe evacuation of miners" as used here indicated that some mine openings developed prior to the effective date of this regulation may or may not be suitable for safe evacuation of miners. For example, an old mine shaft may not be safe for travel because of badly deteriorated shaft lining, timbers, etc., even though it is still suitable for mine ventilation purposes, or a mine shaft developed and equipped with a ventilating fan prior to the effective date of this regulation may or may not be suitable for the safe evacuation of miners, if necessary alterations would adversely affect the mine ventilation in the event of an emergency. Ex. G-2.

Since the manual shows a concern for "some mine openings developed prior to the effective date of this regulation," Mathies concludes that Linden Portal, which was developed after the effective date of the regulation, is not subject to the provisions of the regulation.

The plain language of section 75.1704-2(a) refutes this interpretation of the regulation. The regulation directs that the authorized representative of the Secretary determine the safest, most direct, and most practical route to the nearest mine opening suitable for the safe evacuation of miners. As Linden Portal is the newest and closest escapeway to the working sections in issue, it had been properly designated as the intake escapeway. The fact that the policy manual explains the use of the words "mine openings suitable for the safe evacuation of miners" as resulting from the fact that some old mine openings were not safe for travel because of deteriorated shaft linings and inadequate ventilation, is not a reason to exclude new and safe escapeways from the coverage of the regulation. The regulation is concerned with providing safe escapeways and the obvious intent is to insure that the safest and most direct routes are taken.

Furthermore, it is well established that the MSHA Inspection Manual is not binding on our interpretation of the Act or its regulations. In Secretary of Labor v. King Knob Coal Company, 3 FMSHRC 1417, 1420 (1981), the Commission discussed the legal status of the Manual and stated "that the Manual's 'instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission].'" Old Ben Coal Company, 2 FMSHRC 2806, 2809 (1980)." The Commission noted that "cases may arise where the Manual or a similar MSHA document reflects a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in our according it legal effect." Ibid. However, the case at hand does not require reference to the policy statements of the MSHA Manual. It has already been determined that the stated policy does not exclude Linden Portal from the regulation's coverage and, therefore, the express language of the regulation is not in conflict with either the Manual or its policy. Accordingly, section 75.1704-2(a) is applicable to the Linden Portal.

The evidence indicates that the elevator at Linden Portal became inoperable on July 9, 1981, and that management redesignated the escapeway routes rather than withdraw the miners from the affected working sections. While the testimony conflicts as to whether both the intake and return escapeways were to Kerr shaft or whether the intake escapeway was redesignated to Thomas while the return escapeway remained at Kerr, this is not relevant to a finding of a violation of section 75.1704-2(a). No allegation of a violation of 75.1704 has been made; and therefore, whether the redesignated escapeway plan involved either two mine openings or only one need not be resolved.

Mathies argues that once Linden Portal became unuseable due to the elevator malfunction, it was unsuitable for the safe evacuation of miners. Therefore, by not using Linden Portal, Mathies contends that it complied with section 75.1704-2(a) by redesignating the escapeways to those mine openings

which did provide for a safe evacuation of miners. Mathies' position would allow the operator to bypass its approved escapeway plan whenever it became impossible to comply. This interpretation of the regulation calls for one to ignore the words "as determined by an authorized representative of the Secretary." The regulation requires that escapeways be approved and does not provide an exception granting the operator discretionary authority to modify that plan whenever it becomes inconvenient to follow it.

Mathies contends that the suitability of an escapeway plan requires flexibility allowing it to be determined based upon the existing facts at the time the escapeway designation or redesignation is made. It argues that a "suitable" mine opening is bypassed as part of every operator's escapeway plan because MSHA requires there to be both an intake and return air escapeway. Therefore, even though the intake escapeway is closer, it is not suitable for the return escapeway. This argument relies on a distorted construction of the regulation and the word "suitability." Section 75.1704-2(a) is, after all, a subpart of section 75.1704. "Suitability," therefore, takes into consideration the fact that section 75.1704 requires two escapeways and incorporates that requirement into the standard which the authorized representative of the Secretary must apply. The word "suitability" implies no right to bypass the approved escapeway without authorization.

The fundamental question becomes whether Mathies received permission to bypass the Linden Portal on July 9, 1981. The evidence supports a finding that MSHA policy required that any bypass be granted in writing by the District Manager (Ex. G-3). At no time, has Mathies contended that it received a written bypass from the District Manager. On these facts alone, MSHA could sustain a violation of 75.1704-2(a).

Mathies maintains that it received permission to bypass the Linden Portal from Coal Mine Inspection Supervisor Earl Rudolph and Coal Mine Electrical Inspector Stanley Karpetta. This is premised upon the apparent authority of Mr. Rudolph and Mr. Karpetta to bind MSHA on this matter. Testimony and evidence refutes this claim of any reliance upon the above inspectors' authority to grant a bypass.

William Porter's letter of February 11, 1981, to Supervisor Rudolph, asking him to confirm their conversation about escape procedures does not indicate that any alternative escape plan was approved. (Ex. 0-1). The last sentence states, "I would like to ask for your opinion of this procedure and if there are any differences, additions or deletions please advise." This is a request for comment and shows that there had been no resolution of the escapeway redesignation plan. Indeed, Mr. Porter admitted that he received no written response to this letter (Tr. p. 115). Mr. Porter's testimony indicates that Mathies knew it had no authority to bypass Linden Portal. Mr. Porter stated:

On March 11th, Al Shade, whose name has been mentioned previously in the hearing here, was -- who is a coal mine Inspector, he wasn't on temporary assignment at that time,

he was a coal mine Inspector; and he came to the Linden Portal and, yes, in a conversation prior to the commencement of his inspection that day, he informed us that if we had an elevator which was down, that a Citation would be written and a time would be given us to withdraw the people, or in his words, other things would happen, and that was all that was said.

And, of course, that obviously telegraphed to me that what I proposed was unacceptable somewhere along the line, and I involved Mr. Parisi and other gentlemen again in the problem as to what to do when the elevation [sic] at Linden was down. (Tr. p. 115). [Emphasis added.]

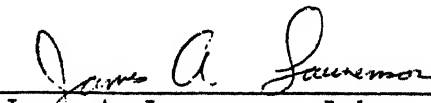
The only conclusion that can be made from these statements is that Mathies knew that it had received neither written nor oral permission to bypass Linden Portal in the event the elevator broke down. It is not contested that Mathies did in fact bypass Linden Portal on July 9, 1981. Accordingly, its failure to exhaust its administrative remedy in obtaining a written bypass from the District Manager justifies a finding that the citation was properly issued.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. Mathies and its Mathies Mine are subject to the Act.
3. Citation No. 1050312 issued on July 10, 1981, charging a violation of mandatory safety standard 30 C.F.R. § 75.1704-2(a) is affirmed.

ORDER

WHEREFORE IT IS ORDERED that Mathies contest of Citation No. 1050312 is DENIED and Citation No. 1050312 is approved.



James A. Laurenson, Judge

Distribution Certified Mail:

Jerry F. Palmer, Consolidation Coal Company, 1800 Washington Road,
Pittsburgh, PA 15241

James Kilcoyne, Esq., Office of the Solicitor, U.S. Department of Labor,
3535 Market Street, Room 14480 Gateway Building, Philadelphia, PA 19104

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 17 1981

FRANK ORNELAS,)	
	)	COMPLAINT OF DISCHARGE,
Complainant,	)	DISCRIMINATION OR INTERFERENCE
)	
v.	)	DOCKET NO. CENT 80-249-DM
)	
PHELPS DODGE CORPORATION,	)	MSHA CASE NO. MD 80-14
)	
Respondent.	)	MINE: Tyrone Mine & Mill
)	

DECISION

Appearances:

Mr. Frank Ornelas
P.O. Box 7958
Bayard, New Mexico 88073
Pro Se

Stephen W. Pogson, Esq.
James Speer, Esq.
Evans, Kitchel & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

On March 10, 1980, the Complainant filed a complaint of discrimination, pro se, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act").^{1/} Complainant alleged that his employment with Respondent was terminated following an investigation of an accident involving two trucks of the Respondent, one of which Complainant was driving. The accident occurred September 6, 1979. Complainant alleges that Respondent had been previously warned by its truck drivers that the procedure under which haul trucks dump ore into the ore crusher

^{1/} Section 105(c) reads in pertinent part as follows:

"No person shall discharge ... any miner ... because such miner ... has ... made a complaint under or relating to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation in a ... mine"

was dangerous. The haul truck accident occurred while Complainant was attempting to back his truck into one of the two crusher dump pockets, in order to dump the ore.

Respondent's answer denies that Complainant was discharged because he engaged in any protected activity and affirmatively alleges that Complainant was discharged because of an unsafe driving record and careless operation of the truck on September 6, 1979, resulting in damage to the truck and danger to other persons.

FINDINGS OF FACT

1. Prior to his discharge on September 8, 1979, Complainant had been a truck driver for Respondent for approximately nine and one-half years.

2. Complainant's duties as a truck driver on September 6, 1979, were to drive Respondent's 170-ton haul truck to a power shovel in Respondent's open pit copper mine and, after the truck was loaded with ore, to transport the ore to the primary crusher where it is dumped.

3. Two bays or entrances are provided in the building where ore from the truck is dumped into the primary crusher. These two bays are 25.4 feet in width and the width of the 170-ton truck is 22.3 feet. The two bays are separated by a pillar at the entrance.

4. The truck drivers are instructed that when they drive to the primary crusher to unload ore they should turn the truck directly in front of the bay they intend to use and then back the truck straight into the bay. The bed of the truck is then elevated and the ore slides into the "dump pocket."

5. On September 6, 1979, after Complainant's truck was loaded with ore, he drove it to the primary crusher. From the outside of the building and looking straight into two bays, the one on the left, or south bay, had a truck in it unloading its load of ore. Complainant began backing up his truck in order to enter the right, or north, bay.

6. Complainant's truck was not directly aligned with the north bay, but was partially in line with the south bay. While the bed of Complainant's truck was backing toward the truck in the south bay, the driver of that truck quickly exited the right side of the driver's cab before the bed of Complainant's truck struck the left front of the truck in the south bay.

7. Complainant then drove his truck forward and backed up again. On this occasion, the bed of Complainant's truck again struck the truck in the south bay and damaged the hand rail on the left hand side of that truck. Complainant's truck continued backing into the north bay until it was into position to dump ore.

8. Complainant did not know that his truck had struck the truck in the south bay until after Complainant's truck was in final position to dump the ore. The driver of the damaged truck shouted at Complainant, informing him of the accident.

9. The damage to the truck in the south bay was approximately \$17,000 and installation costs for a new cab were from \$3,000 to \$4,000.

10. On March 13, 1979, approximately 5 months before the accident, a written safety suggestion by a truck driver for the Respondent was submitted to the supervisor. The suggestion was that the haul truck in the south bay should finish dumping its load of ore and drive out before the next truck enters the north bay, so that the truck in the south bay will not be "run over" by a truck backing into the north bay. This suggestion was supported by other truck drivers, but was rejected by management on May 9, 1979.

11. Immediately following the accident on September 6, 1979, the shift foreman gave Complainant a written notice of possible disciplinary action or suspension.

12. On September 8, 1979, Complainant was given a written "notice of discharge." The stated reason for the discharge was for careless operation of the truck Complainant was driving, resulting in extensive damage to the other truck, and for endangering the driver of the other truck.

ISSUE

The threshold questions to be answered are (1) whether or not Complainant engaged in any protected activity and, if so, (2) whether his discharge was motivated in any part by that protected activity. If these questions cannot be answered favorably for the Complainant, then Respondent did not violate section 105(c) of the Act when it fired him.

DISCUSSION

The test to be used in deciding this case is set forth in Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (October 14, 1980). The guidelines are as follows:

"We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity.

Employee activity which is protected by the Act is set forth in section 105(c)(1), and includes:

"... a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine, ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act."

Complainant testified that he had made complaints at safety meetings at some time prior to the date of the accident in regard to the manner in which the trucks dumped ore at the primary crusher. His testimony was that he had told his foreman that it was dangerous dumping "two trucks at a time." Another driver had made a written safety suggestion to Respondent on March 13, 1979, suggesting that the truck in the south bay finish dumping its load of ore before another truck pulled into the north bay. This suggestion had been rejected by Respondent on May 9, 1979, approximately four months before the accident occurred. Had the suggestion been followed there would have been no truck unloading or in the south bay when Complainant attempted to back his truck into the north bay. Thus, the accident could have been prevented had the suggestion been followed.

When Complainant made his complaint, notifying his foreman at the safety meetings of the alleged danger in the ore dumping procedure at the primary crusher, he was engaged in protected activity. However, there is no evidence that the termination of Complainant's employment was motivated in any part by that protected activity.

Respondent presented evidence that, in addition to the accident of September 6, 1979, Complainant had an accident on January 31, 1979, while operating a truck. He had failed to look into his rear view mirror and had backed into another truck near the primary crusher. On another occasion, while operating a truck loaded with ore, Complainant accidentally backed the truck through a berm. The berm was in place in order to protect personnel and equipment from falling approximately 100 to 150 feet downward into a dump or canyon. After backing through the berm the truck came to rest with the rear wheels hanging over the edge of the dump and the front wheels up off the ground. The bottom of the truck was resting on its fuel tanks. Respondent argued that Complainant's employment was terminated for these reasons.

Complainant stated at the hearing that he felt he had been discriminated against in that he was fired for a truck accident even though other drivers had the same type of accidents and they were not fired. Assuming Complainant's contention is true, there was, however, no evidence produced at the hearing to show that Complainant's termination of employment by the Respondent was motivated in any part by Complainant's protected activity of making a safety complaint or suggestion in regard to the manner and order in which trucks dump their ore at the primary crusher. I conclude that Complainant's employment was terminated because Respondent had some doubts about Complainant's ability to safely operate a haul truck and that Complainant was not fired because he had made safety complaints or had engaged in protected activity.

Thus, Complainant has failed in his burden proof to show that his termination of employment was motivated in any part by his having engaged in protected activity.

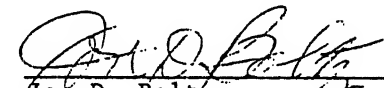
CONCLUSION OF LAW

1. The undersigned Judge has jurisdiction over the persons and subject matter of these proceedings.

2. Complainant has failed to prove by a preponderance of the evidence that Respondent violated section 105(c) of the Act when it discharged Complainant on September 8, 1979.

ORDER

The complaint is dismissed.


Jon D. Boltz
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

NOV 17 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 81-68
Petitioner	:	A/O No. 11-00609-03024
v.	:	
	:	Captain Strip Mine
SOUTHWESTERN ILLINOIS COAL CORP.,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner;
Brent L. Motchan, Esq., Southwestern Illinois Coal Corp.,
St. Louis, Missouri, for Respondent.

Before: Judge Charles C. Moore, Jr.

This civil penalty suit against Respondent alleges that it committed two violations of the safety standards promulgated pursuant to the Federal Mine Safety and Health Act of 1977.

Citation No. 1005247 was issued on September 16, 1980, and alleges that Respondent violated 30 C.F.R. § 77.1607 in that a stop cord was not operating properly along a portion of the unguarded conveyor belt. The evidence establishes that the emergency stop cord was inoperable. The issue is whether the conveyor belt was unguarded since only unguarded conveyor belts are required to have emergency stop cords. It was the inspector's opinion that the conveyor was unguarded because there were exposed pinch points along the conveyor belt.

I do not agree with the inspector's opinion that an emergency stop cord is a substitute for a guard around pinch points. Pinch points must be guarded whether or not a stop cord is present. 30 C.F.R. § 77.400, like sections 75.1722(a), 55.14-1, 56.14-1 and 57.14-1, states: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

I first had occasion to interpret the above guarding standard in Dravo Lime Company v. Mining Enforcement and Safety Administration, 2 FMSHRC 771. 1/ In that case an operable stop cord extended the entire length of the conveyor belt except that the belt was "skirted" or shielded with plate metal and rubber belting at the point where it dumped limestone onto another belt. The following statement appears at pages 772 and 773 of that decision.

For dust control purposes the entire dumping area is shielded with plate metal with rubber belting attached to the sides of the shielding. This rubber belting attached to the plate metal rubs against the belt itself forming a dust shield. MESA does not contend that all idler rollers should be shielded, because if a miner caught his hand between the roller and the belt in an unskirted area, the belt could give way and his hand could be withdrawn. In the skirted area however, there is only five-eighths of an inch between the side of the metal skirt and the belt so that if a miner's hand got caught between the roller and the belt, the belt could only raise up five-eighths of an inch before being stopped by the metal skirt. It is MESA's contention that this constitutes a "pinch point" which in turn gives rise to the requirement of guards to prevent any part of a miner's body from being caught in such a "pinch point." In this instance, a pinch point is something like a clothes wringer.

* * * * *

Drive pulleys, head pulleys, tail pulleys and takeup pulleys all contain "pinch points" (Tr. 55-56, MESA Exhibit R-6, pages 2 and 3). That was undoubtedly the reasons why these particular pulleys were specifically included in the standard. Idler pulleys however, do not contain "pinch points" as a rule, because the belt has leeway to move away from the idler pulley in the absence of a skirted area such as the one involved in the instant case. It is the "wringer effect" which can cause a serious injury. It is my opinion, that the combination of a skirted belt with the catwalk and ladder next to it causes the idler pulleys to become "similar exposed moving machine parts which may be contacted by persons, and which may cause injury * * *."

The existence of a stop cord beside the belt which will stop the drive and result in the belt stopping after a movement of approximately 22 feet may diminish the extent of a potential injury but would not prevent the injury unless pulled five seconds before contact with the "pinch point."

1/ Dravo was brought under the old Federal Metal and Nonmetal Mine Safety Act and was decided October 28, 1977. It appears in the March 1980 volume of FMSHRC decisions as an attachment in Secretary of Labor, Mine Safety and Health Administration v. American Sand & Gravel Co., 2 FMSHRC 763 (Mar. 31, 1980).

In summary, all pinch points must be guarded, 2/ and the portions of a belt which do not contain pinch points must either be guarded or be equipped with an emergency stop cord. A stop cord might help the miner who fell on the belt but it certainly would not prevent him from getting caught in a pinch point.

MSHA Exhibit No. 3 is a guide to mechanical equipment guarding. On page 14, there is a drawing (figure 11) and the following words: "In this drawing, a railing is installed along the conveyor in lieu of a stop cord. This may be considered as a guarded conveyor. The railing is placed away from and slightly above the belt to prevent contact with the moving belt." The guardrail in figure 11 appears to be parallel to, and a few inches away from, the edge of the belt. The drawing is not sufficiently clear to determine whether it is also slightly above the belt. The man in the drawing has his left hand on a handrail and his right hand on the so-called guardrail. Respondent's Exhibit No. 2 is a photograph of Respondent's conveyor belt showing a miner in a position similar to the miner in figure 11. The miner in the photograph is pointing his left hand at a lower handrail installed next to the belt and his right hand at a metal railing that had been installed above the belt to keep coal from falling off the belt. Respondent contends that this upper rail is also a guardrail eliminating the necessity of an emergency stop cord.

The inspector stated on cross-examination that the guard in Exhibit No. 2 appeared to be slightly away from and slightly above the belt. While that description is similar to the language in the guide, the

2/ The inspector did not agree as shown by the following at Tr. 51:

JUDGE MOORE: But before you do, I want to make some -- get something clear with the witness. Now you've said this before. I want you to think about it now. Section 77-400(a) . . . is the one that says gears, sprockets, chains, etc., shall be guarded. Now, is it your testimony that you're taught that they do not have to be guarded if there's a stop cord?

THE WITNESS: That -- that is MSHA policy, sir.

JUDGE MOORE: Well, now -- who told you it was MSHA policy?

THE WITNESS: Well, again, that comes from my supervisor and -- and --

JUDGE MOORE: Did they tell you that at Beckley?

THE WITNESS: -- what I've received in training. Yes, sir. Yes, sir. That conveyors, per se, the length of them, if they're provided with an emergency stop cord --

conveyor belts are entirely different. In the photograph, Respondent's Exhibit No. 2, the railing that is supposed to be a guardrail is away from the belt only to the extent that it is above the belt. It is not installed in a position similar enough to the rail in figure 11 to prevent a miner from coming into contact with the belt or the rollers. In fact, the railing itself might create a pinch point which would require separate guarding if the distance between the upper edge of the roller and the lower edge of the railing is sufficiently small. This appears to be the case in Respondent's Exhibit No. 2, but there is insufficient evidence in the record for me to make a finding to that effect.

The regulation requires in any case, that a belt either be guarded or equipped with an operable emergency stop cord. Respondent's belt had neither and a violation is accordingly established. If there were pinch points of the type discussed in Dravo, supra, the hazard would be high. Since I cannot find that type of pinch point based on the evidence in this case, I find a moderately low degree of gravity. It is unlikely that a miner would be seriously injured if his hand went between the roller and the belt. As to negligence, if Respondent relied solely on the guardrail depicted in Respondent's Exhibit No. 2 to guard this belt I would find negligence. In this case, however, Respondent only relied on the guard as a defense after it was established that the stop cord had malfunctioned. I find a low degree of negligence and assess a penalty of \$100.

Citation No. 1005253 alleges a violation of 30 C.F.R. § 77.409 in that a caterpillar dozer was operating "without being equipped with a warning device which could be sounded by the operator prior to starting operation." There was a warning horn on the vehicle but it did not work. There was also, however, a backup alarm which could be sounded prior to starting and it was operable. The regulations do not require separate backup alarms and prestarting alarms.

MSHA Exhibit No. 6 is a memorandum dated June 24, 1977, from District Manager of District 8 to the Subdistrict Manager in St. Clairsville, Ohio, concerning § 77.409. Nothing in the memorandum prohibits the use of a backup alarm as a prestarting alarm. Furthermore, in a letter from the Subdistrict Manager to Respondent dated September 19, 1977, the Subdistrict Manager specifically states that "activating the backup alarm on tractors to warn persons that the machine is about to start operations could be accepted as compliance with Section 77.409(a), providing the intent as expressed in the District Manager's memorandum of June 24, 1977, is met."

The Government argues that Respondent is attempting to estop MSHA from enforcing the regulation by relying on these exhibits. Government Exhibit 7 does not estop the Government from enforcing a regulation; it merely shows that the subdistrict manager had an opinion, consistent with the regulations, that a backup alarm which is sounded continuously when the machine is backing and a startup alarm which is only sounded

once during a "cycle of events" (See Gov't. Ex. 6) can be the same horn and have the same sound. MSHA Exhibit 6, in discussing section 77.409(a) states that alarms should be sounded:

- "1. Before the equipment is started.
2. Before the equipment is operated in reverse."

If the statements in MSHA Exhibits 6 and 7 were contrary to the regulations and Respondent relied on them, a question of estoppel might arise. But as these exhibits do not contradict the standard it makes no difference whether Respondent relied on them. It's the idea that backup alarms and prestarting alarms must have a different sound that seems to have come out of thin air.

On this tractor the backup alarm horn was facing toward the rear, but the evidence established that it can be heard from both the front and the back of the machine. I find that no violation was approved and accordingly, vacate the citation.

ORDER

Respondent is therefore ordered to pay to MSHA, within 30 days, a civil penalty of \$100.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 17 1991

ROSALIE EDWARDS,

Complainant,

v.

AARON MINING, INC.,

Respondent.

COMPLAINT OF DISCHARGE,
DISCRIMINATION, OR INTERFERENCE

DOCKET NO. WEST 80-441-DM

MD 80-112

Appearances:

Rosalie Edwards, Pro Se
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Boewawe, Nevada 89821

Bruce T. Beesley, Esq.
Woodburn, Wedge, Blakey and Jeppson
One East First Street
Reno, Nevada 89505
For the Respondent

Before: Judge John J. Morris

DECISION STATEMENT OF THE CASE

Complainant Rosalie Edwards brings this action on her own behalf alleging she was discriminated against by her employer, Aaron Mining, Inc., (Aaron), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The statutory provision, Section 105(c)(1) of the Act, now codified at § 30 U.S.C. 815(c)(1), provides as follows:

§ 105(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or

because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties a hearing on the merits was held in Reno, Nevada, on April 28, 1981. Respondent filed a post trial brief.

ISSUES

The issues are whether respondent discriminated against complainant in failing to furnish toilet facilities. A further issue is whether complainant voluntarily quit her employment or was discharged.

For the reasons hereafter stated I sustain the claim of discrimination and enter an award in favor of complainant.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of § 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone, David Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (1980). Reversed on other grounds, United States Court of Appeals, Third Circuit, Docket No. 80-260, (October 1981). Further, in order to support a valid refusal to work the miner's perception of the hazard must be reasonable, Robinette v. United Castle Coal Company 3 FMSHRC 803, (1981).

FINDINGS OF FACT

The facts are essentially uncontroverted.

1. Complainant Mrs. Rosalie Edwards was employed by Aaron from January 21, 1980 to March 15, 1980 (Tr. 7 - 10).

2. Mrs. Edwards worked at the company mine assaying gold samples (Tr. 9, 10).

3. There were no toilet facilities in the work area. The closest outhouse, where the sanitary conditions were "appalling", was 3/4 of a mile away. It could only be reached over a haul pack road with limited visibility (Tr. 17, 41).

4. In addition to working as an AA Assayer (atomic absorption with cyanide) Mrs. Edwards' duties also included writing up daily safety reports to the company. Under "remarks" Mrs. Edwards indicated the need for a facility. There was no reply from the company except her supervisor said they would put in a restroom "soon" (Tr. 18, 19).

5. After four weeks on the job Mrs. Edwards began having bladder problems for which she took off a week (Tr. 19).

6. Mrs. Edwards terminated her job on March 15, 1980. At that time she was working 48 hours per week and earning \$1,500.00 per month (Tr. 33, 34).

7. When she quit Mrs. Edwards told her supervisor she would return when they had restroom facilities (Tr. 34, 37, 46, 50).

8. Mrs. Edwards could not find any employment until October, 1980 (Tr. 34).

9. On October 23, 1980, Mrs. Edwards learned that Aaron was no longer affiliated with the property and she was hired by its successor, the Miller-Kappas Company (Tr. 20).

10. Mrs. Edwards expenses for the hearing include \$21.36 for lodging, \$15.00 for meals, and 600 miles (roundtrip) to drive to and return home from the hearing site (Tr. 35).

DISCUSSION

30 C.F.R. 56.20-8, a mandatory regulation promulgated by the Secretary, provides as follows:

56.20-8 Mandatory. Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel. The facilities shall be kept clean and sanitary. Separate toilet facilities shall be provided for each sex except where toilet rooms will be occupied by no more than one person at a time and can be locked from the inside.

The credible facts establish that Aaron failed to comply with the regulation in several respects. First, the facilities were, even by Aaron's evidence, a half mile from Mrs. Edwards' laboratory. In addition the toilet could only be reached over a haul pack road which had restricted visibility. The facility accordingly was not "readily accessible" to Mrs. Edwards. In addition the toilet was neither clean nor sanitary. Mrs. Edwards undisputed testimony indicates the sanitary conditions in the outhouse were "appalling."

Mrs. Edwards duties, in addition to assaying gold included the filing of daily written safety reports. On such reports under "remarks" Mrs. Edwards continually pointed out the need for toilet facilities. When she quit Mrs. Edwards also indicated she would return when the company had such facilities. Aaron failed to provide the facilities.

The law is clear that a miner may not be fired for refusing to work under conditions that she reasonably believes are unsafe or unhealthy. Phillips v. Interior Board 500 F.2d 772 (D.C. Cir., 1974), Pasula, supra. In this unusual factual situation Mrs. Edwards alternatives were severely limited. First, she could complain to the company but she had done that. Aaron already had received written and oral complaints for about 7 weeks. Second, she could use the toilet facilities at her home, a 20 mile round trip. In fact, with Aaron's knowledge she did this on a number of occasions (Tr. 19, 36). During her employment she developed a bladder infection. An infection of this nature would support her belief that an unhealthy condition existed. A ten mile journey is not "ready accessibility." A third alternative would be the use of the outhouse which I find from the facts was 3/4 of a mile from the laboratory. That was hardly "readily accessible." A fourth alternative was to quit. She did. The first three alternatives are unreasonable and in law they are no alternative at all. Cf McCoy v. Crescent Coal Company PIKE 77-71. In any event even a palatable alternatives would not excuse compliance with a mandatory standard.

I, accordingly, conclude that Mrs. Edwards was engaged in a protected activity in filing daily written safety reports complaining about the lack of toilet facilities. Further, Mrs. Edwards was constructively discharged while engaging in that activity. McCoy v. Crescent Coal Company, supra.

Portions of the evidence in this case should be discussed. Mrs. Edwards testified she applied in October for employment with Miller Kappas Company, the successor to Aaron (Tr. 20) After being hired by Miller Kappas Mrs. Edwards was told to drop her discrimination case or be terminated. These directives came through Pat Daugherty, a Miller Kappas supervisor. This double hearsay directive is attributed to Andrew Robertson, the President of Aaron. I do not find this evidence relevant nor credible. The record here fails to disclose any connection between Robertson and Miller Kappas Company. Further, any issues raised in connection with her discharge by Miller Kappas Company are the subject of another discrimination claim made by Mrs. Edwards. Apparently the Solicitor of Labor had taken no action on that matter at the time of the instant hearing.

AARON'S CONTENTIONS

Aaron contends that Mrs. Edwards case fails for a number of reasons. Aaron cites the case law that to sustain a violation a complainant must show notification, discriminatory action, and motivation of discriminatory action by the employer. Aaron relies on Munsey v. Morton 507 F.2d 1202 (D.C. Cir., 1974) and Baker v. U.S. Department of Interior Bd. 595 F.2d 746 (D.C. Cir., 1978).

Specifically, Aaron says that Mrs. Edwards voluntarily left her employment and that Aaron did not discriminate against her.

For the reasons previously stated I find that Mrs. Edwards was constructively discharged by Aaron. Further, she was discriminated against in that Aaron failed to provide toilet facilities, a condition which Aaron choose to ignore for seven weeks. The fact that Mrs. Edwards was permitted and encouraged by Aaron to use the restroom facilities at her home, a 20 mile round trip, does not eliminate the discrimination. In addition, Aaron's offer of a salary increase to Mrs. Edwards as an inducement to stay cannot avoid the discrimination.

The cases relied on by Aaron are not inopposite the views expressed here. In Munsey, supra, the Court of Appeals for the District of Columbia construed the 1969 Coal Act. Neither the facts nor the law set forth in Munsey support Aaron. The same result pertains in Baker, supra, where the Court of Appeals for the District of Columbia construed the notice provisions of the 1969 Coal Act.

Aaron's post trial brief attacks the double hearsay evidence from Mrs. Edwards of statements by Pat Daugherty, a Miller Kappas supervisor, referring to statements he made about directives he received from Andrew Robertson, President of Aaron. For the reasons previously stated I do find that evidence credible. Likewise, I disregard the post trial affidavit filed by Andrew Robertson regarding that matter. The consideration of such an affidavit after the testimony was concluded would be to deny Mrs. Edwards her right of cross examination.

BACK PAY, COSTS, AND EXPENSES

Section 105(c)(3) of the Act, now 30 U.S.C. 815(c), authorizes an award for back pay, interest, as well as all costs and expenses.

Mrs. Edwards seeks to recover her back wages from the date of her discharge on March 15, 1980 (Letter dated September 11, 1980). At the time of her discharge she was earning \$1,500.00 per month. She could not find employment until she was hired by Miller Kappas Company on October 23, 1980. Accordingly, her back pay is for seven months and one week (March 15, 1980 to October 23, 1980) at \$1,500.00 per month. Back pay is therefore \$10,875.00 (\$1,500 x 7) + (\$375 x 1). Respondent as the employer is responsible for withholding all statutory deductions, including federal and state taxes. Further, Aaron is to pay interest on said back pay at the rate of 12 1/2% per annum.^{1/}

^{1/} Interest rate used by Internal Revenue Service for underpayments and overpayments of tax, Rev Ruling 79-366. Cf Florida Steel Corporation, 231 N.L.R.B. No. 117, 1977-78, CCH, N.L.R.B. Para 18,484; Bradley v. Belva Coal Company WEVA 80-708-D (April 1981).

Mrs. Edwards is further entitled to recover her incidental expenses for meals, lodging, and mileage. The meals and lodging cost were \$36.36. I calculate her mileage expense at 18 1/2¢ per mile which was the amount authorized by the United States Government for the use of a privately owned vehicle on government business. Complainant's mileage expense is therefore \$111.00 (600 x 18 1/2¢).

CIVIL PENALTIES

In this case the Secretary of Labor did not represent complainant. However, the Act provides that any violation of the discrimination section shall "be subject to the provisions of section 108 and 110(a)." [30 U.S.C. § 818, 820]. The statute authorizes the imposition of a penalty in an amount not to exceed \$10,000.00. [30 U.S.C. § 820(a)].

Considering the pertinent statutes and in view of the facts as stated above, I deem a penalty of \$1,000.00 to be an appropriate civil penalty in this case.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Complainant's claim of discrimination is sustained.
2. Respondent is ordered to pay the sum of \$10,875.00 less deductions to complainant as back pay. Respondent is further ordered to pay interest on said back pay at the rate of 12 1/2% per annum.
3. Respondent is ordered to pay the sum of \$147.36 to complainant for incidental expenses as follows:

Meals	\$ 15.00
Lodging	21.36
Mileage	111.00
	<hr/>
	\$147.36

4. A civil penalty of \$1,000.00 is assessed against respondent for violating Section 105(c) of the Act. Said amount is payable 40 days after the decision of the Commission becomes a final order. Said civil penalty shall be paid in accordance with Section 110(j) of the Act [30 U.S.C. 820(j)].


John J. Morris
Administrative Law Judge

Distribution:

Rosalie Edwards
Starr Route
Beowawe, Nevada 89821

Bruce T. Beesley, Esq.
Woodburn, Wedge, Blakey and Jeppson
One East First Street
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

NOV 17 1981

CONSOLIDATION COAL COMPANY,	:	Contest of Order
Contestant	:	
	:	Docket No: WEVA 81-341-R
v.	:	Order No: 854357; 3/16/81
	:	
SECRETARY OF LABOR,	:	Pursglove No. 15
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: WEVA 81-441
Petitioner	:	A.O. No: 46-01454-03090 V
	:	
v.	:	Pursglove No. 15
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION AND ORDER

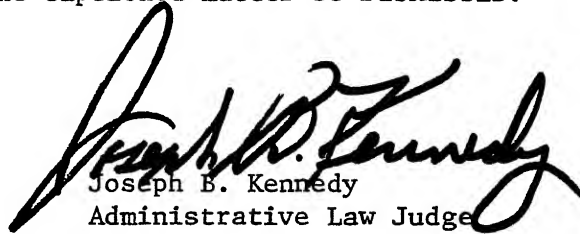
The parties move for approval of a settlement of a violation that created a serious hazard of death or disabling injury in the event of a fire on the beltway in question. It was clearly an unwarrantable failure violation and in view of respondent's history of prior violations of the standard in question and its overall incidence of injury rate the violation merits a more severe penalty than the reduced (\$400 from \$750) penalty proposed for settlement.

On the other hand, the Commission has admonished its trial judges to adopt a "wise" rather than a "zealous" attitude toward enforcement of the Mine Safety Law. This translates as a "soft" rather than a "tough" policy of enforcement.

Respondent, of course, is tough, very tough. Knowing respondent as well as I do and knowing what this record reflects as to its attitude toward compliance, I think the settlement proposed is too low. The assessment office also thought it too low and I have little doubt MSHA would think it too low. But the Solicitor who speaks for the Secretary, rather than MSHA, thinks the penalty proposed is appropriate because the violation was more or less a run-of-the-mine type of violation. Furthermore, knowing the Commission as I do, I think the Commission, after consulting with the Solicitor, would not think it too low. That is what is known in some circles as "wise" enforcement. Thus, whether the penalty will deter future violations and ensure voluntary compliance seems almost immaterial.

For these reasons, I reluctantly conclude the motion to approve settlement should be approved. I hope I am wrong and that the Commission will review this decision on its own motion and delineate a more "zealous" enforcement policy. If it does not I will be sadder but indeed wiser.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, APPROVED. It is FURTHER ORDERED that the operator pay the settlement agreed upon, \$400, on or before, Tuesday, December 1, 1981 and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

H. Juanita M. Littlejohn, Esq., Consolidation Coal Company,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 20 1981

SECRETARY OF LABOR,	:	Complaint of Discrimination
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 81-27-DM
ON BEHALF OF JAMES W. FURMAN,	:	
Complainant	:	
	:	
v.	:	
	:	
A. FERRANTE & SONS, INC.,	:	
Respondent	:	

DECISION AND ORDER

As the result of the trial judge's review of the parties' prehearing submissions and what transpired at the prehearing/settlement conference of September 16, 1981, the trial judge exercised "his inherent authority to question whether as a matter of law" 1/ this case presented a valid cause of action. The circumstance giving rise to this query was the fact that the prehearing submissions showed the alleged report of a health hazard did not occur until after complainant's alleged voluntary quit.2/ Since there was no genuine dispute about the excuse complainant gave for refusing to perform his assigned work tasks before he voluntarily quit his place of employment, the trial judge suggested the controlling question of law be determined on a motion for summary judgment. To this end, the parties were directed to take depositions of complainant and other material witnesses and advise the Court as to whether a summary procedure or a trial-type hearing would be necessary to resolve the matter. While the Commission views such judicial activism with alarm 3/ the parties thought that in this case it made

1/ Secretary v. Olga Coal Co., 2 FMSHRC 2769 (1980); 1 MSHC 2537.

2/ There was no claim that respondent's refusal to reinstate or rehire complainant was retaliatory. See, Munsey v. Morton, 1 MSHC 1220 (D.C. Cir. 1974); Munsey v. Morton, 1 MSHC 1709 (D.C. Cir. 1978).

3/ In Secretary v. Missouri Gravel Company, 3 FMSHRC ___, No. LAKE 80-83-M, decided November 4, 1981, the Commission held that "Summary decision is an extraordinary procedure" to be reserved for the "most exceptional of circumstances". And in Secretary v. Knox County Stone Company, 3 FMSHRC ___, DENV 75-359-M, decided November 6, 1981, the Commission deplored the trial (footnote 3 continued on page 2)

a lot of sense. So much sense in fact that after they took complainant's deposition on October 8, 1981, they advised the trial judge of their desire to join in an appropriate motion to dismiss the complaint with prejudice. When the Secretary's client, the complainant, did not agree, he was advised of his right to file a complaint pro se or through his own counsel. 4/

(footnote 3 continued)

judge's use of a "form of sua sponte summary judgment" that avoided an evidentiary hearing in a case involving a violation which the Commission characterized as "relatively minor or technical" and for which it accepted a \$36.00 penalty in lieu of my assessment of \$500.00. More disturbing was the Commission's effort to inhibit suggestions by its trial judges for procedural shortcuts in de minimus cases. In a discussion which it characterized as wholly "extrinsic to the matter under review" it undertook a polemic on ex parte communications that seems designed to wall off any meaningful procedural discussions between the trial judge and counsel. The tenuous nexus with the case under review was a record which clearly showed that after both parties had submitted motions to dismiss or to approve settlement the trial judge told them he could not approve the settlement proposed, \$36.00, but would proceed to treat the motions to dismiss as cross motions for summary decision for the purpose of determining the amount of the penalty warranted. Such a proposal is one of the recognized exceptions authorized by law to the general prohibition against ex parte communications that relate to the merits of a case. This was because the communication in question did not relate to the merits of any issue pending but only to the procedure best adapted to an expeditious and inexpensive disposition of the pending motions. What the Commission seemed to overlook is that the United States Court of Appeals for the Second Circuit has held it is not inappropriate for a trial judge to treat sua sponte any motion to dismiss as a motion for summary judgment where it is clear that the case does not present an issue of material fact and the parties are afforded an opportunity to present materials in opposition to the motion. Corporacion de Mercadeo Agricola v. Mellon Bank International, 608 F.2d 43, 48 (2d Cir. 1979); Flli Moretti Cerali v. Continental Grain Co., 563 F.2d 563, 563 (2d Cir. 1977).

Whether viewed as a profound misunderstanding of what occurred or more simply as a suggestio falsi, suppressio veri, it is to be hoped that Knox County does not presage a further mischievous intrusion into the authority of the trial judges to regulate the course of penalty proceedings and to provide an expeditious and inexpensive remedy.

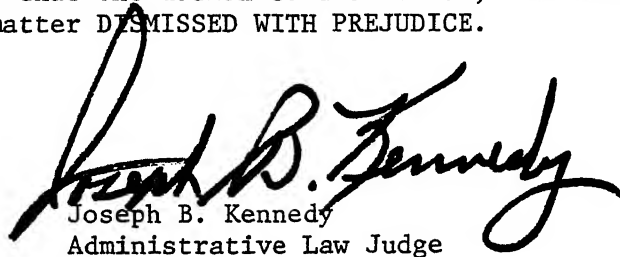
4/ See, Secretary's Letter of Determination, filed October 30, 1981. When the Secretary acting on behalf of an alleged discriminatee decides the evidence will not support a finding of violation and that the case should be dismissed, it is not clear whether the complainant has a cause of action under section 105(c)(3) of the Act that survives such a dismissal.

The trial judge agreed to consider the proposed motion provided complainant's deposition was furnished for the record. This was done and I have now carefully reviewed Mr. Furman's deposition. It clearly establishes complainant's propensity for confusing fact with fantasy, a practice which is sometimes known as confabulation. This circumstance certainly warranted a reevaluation of the merits of the complaint, because it seriously impugns Mr. Furman's credibility.

My independent evaluation of the matter leads me to conclude that the complaint was improvidently filed, as a matter of law, and that the Secretary's principal witness has, as a matter of fact, fatally flawed his ability to give a credible account of the circumstances of the alleged discrimination.

Counsel for the Secretary in this matter is to be commended for the professionalism demonstrated in recognizing early on the lack of merit in his case. 5/

Accordingly, it is ORDERED that the motion to dismiss be, and hereby is, GRANTED and the captioned matter DISMISSED WITH PREJUDICE.


Joseph B. Kennedy
Administrative Law Judge

5/ All too often, I have had the sad experience of watching the Secretary's counsel forge ahead with a case obviously sinking under him because he fears the reaction from his own bureaucracy of admitting an error in bringing the case. Unfortunately, disapproval of procedural devices designed to surface such fatal deficiencies may encourage an "after all its only taxpayer's money we are spending" attitude on the part of less courageous counsel.

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 24 1981

CHARLES HARVEY,

Complainant,

v.

HOWARD QUARRIES,

Respondent.

COMPLAINT OF DISCHARGE,
DISCRIMINATION OR INTERFERENCE

DOCKET NO. CENT 81-9-DM

MSHA CASE NO. MD 80-151

Appearances:

Charles Harvey, Slater, Missouri
appearing pro se, on behalf of Complainant

E. J. Holland, Jr., Esq.
James T. Price, Esq.
Kansas City, Missouri
appearing on behalf of Respondent

Before: Judge John J. Morris

DECISION

STATEMENT OF THE CASE

Complainant Charles Harvey brings this action on his own behalf alleging he was discriminated against by his employer, Howard Quarries, Inc., in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The statutory provision, Section 105(c)(1) of the Act, now codified at § 30 U.S.C. 815(c)(1), provides as follows:

§ 105(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner re-

representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties a hearing on the merits commenced in Sedalia, Missouri on April 8, 1981. On that date the case was partially heard and complainant's motion for a continuance to produce additional evidence was granted. The hearing was concluded on June 23, 1981. The parties filed post trial briefs.

ISSUES

The issue is whether Charles Harvey was discharged because he complained about excessive dust and requested a dust respirator mask at the quarry or whether Harvey was discharged because his work was unsatisfactory.

For the reasons hereafter stated, I find in favor of Howard Quarries, and I dismiss the discrimination complaint.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of § 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone, David Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (1980), Rev'd on other grounds, No. 80-2600 (3d Cir. October 30, 1981).

FINDINGS OF FACT

The references to the transcript of the April 8 hearing are prefixed as "Tr. 1" and references to the transcript of the June 23 hearing are prefixed as "Tr. 2."

1. Charles Harvey was employed as a stockpiler by Howard Quarries, Inc., between December 26, 1979 through July 25, 1980 (Tr. 1: 10, 13, 29).
2. A stockpiler's duties include driving a truck (50% of the time), removing rock and debris from under the conveyor belts (35% of the time), and doing maintenance work on the crusher (15% of the time) (Tr. 1: 33).
3. Charles Harvey was a good truck driver, but he didn't do his assigned work of shoveling from under the conveyor belts. His work performance was poorer than other employees (Tr. 1: 34-37).
4. In May 1980 workers Winfrey, White, and Mennard complained to supervisor Rowden that they were tired of doing Harvey's share of the work (Tr. 1: 40).
5. Rowden talked to Harvey and told him he'd be let go if he didn't improve. Harvey didn't improve (Tr. 1: 39).
6. On July 24, 1980 Rowden assigned Harvey, with Burns, to shovel. Thirty or forty minutes later Harvey was laying under the conveyor (Tr. 1: 42).
7. Burns quit that day stating he couldn't work with Harvey (Tr. 1: 42).
8. Harvey was fired the next day (July 25) at quitting time. He was fired because of his work performance and due to Burn's conversation with Rowden (Tr. 1: 43).
9. During his employment Harvey never asked Rowden for a dust respirator, nor did he ever complain to Rowden or to his fellow workers about safety (Tr. 1: 43).
10. Rowden, who has discharged five workers in the past two years, didn't treat Harvey any differently from any other worker (Tr. 1: 45-46).
11. After an MSHA inspection Howard Quarries air conditioned the crusher shack and acquired a water tank which was used when needed (Tr. 1: 47; 2: 41).
12. Rowden has never disciplined any worker for complaining about dust nor has Rowden ever told an employee to buy a dust respirator (Tr. 1: 49).
13. The day before he was fired fellow worker Shively observed Harvey laying under the crusher for 15 or 20 minutes when he was supposed to be working (Tr. 2: 8-9, 18).

14. Shively indicated Rowden was concerned about safety (Tr. 2: 15).
15. Worker Gray indicated he had seen Harvey loafing on the job (Tr. 2: 29-30).
16. After Harvey bought a respirator he used it for awhile and then gave it to Winfrey (Tr. 2: 37).
17. Normally dust masks were available at the quarry (Tr. 2: 40).
18. No worker was ever disciplined for making a safety complaint (Tr. 1: 51).
19. Rowden was concerned about dust and never hesitated to send Winfrey to water down the road (Tr. 2: 42).

DISCUSSION

Harvey would have the Commission believe that he complained about excessive dust and requested a dust mask. The credible evidence leads to a contrary conclusion. Rowden's testimony is confirmed by workers Shively, Gray, and Winfrey. Harvey never asked for a mask nor did he ever complain about safety. Harvey's use of a mask he purchased was short-lived since he gave it to Winfrey. Further, Winfrey didn't see Harvey using a mask after that event. Further, Harvey's request for a mask would hardly have been a motivating factor for his discharge since masks were generally furnished by the quarry and available to the workers.

Harvey would further have the Commission believe that the dust complaint and request for a mask motivated Howard Quarries to fire him. Again, the credible evidence leads to a different conclusion. The uncontroverted evidence also establishes that no employee was ever disciplined for a safety complaint. Further, Rowden was committed to safety and would respond quickly with the use of the water truck whenever the employees mentioned the dusty conditions. The quarry airconditioned the crusher shack and provided respiratory protection to its workers. In view of the foregoing evidence, which is uncontroverted, I conclude that Harvey's claims cannot be upheld.

In short, the evidence does not establish that Harvey was engaged in a protected activity for which he was discharged. The evidence does establish that Harvey was discharged for his poor work performance.


Some evidence describes Harvey as a "fair" worker (Tr. 1: 10; 2: 34). However, Rowden, Shively and Gray all confirm the events of July 24, 1980. Harvey's actions on that date and his prior performance caused him to be discharged. On that day Harvey was assigned to clean out from under the conveyor. Harvey spent 15 to 25 minutes laying under the conveyor. He was laughing at his supervisor Rowden while Rowden was looking for him. Burns quit because of Harvey. The evidence also reflects that Harvey's job discipline in other respects was inadequate. There were occasions in talking to Rowden where he said he wouldn't do his assigned duties. On two

or three occasions Harvey had tried to convince Winfrey that he (Winfrey) should stop shoveling when Rowden disappeared (Tr. 1: 41-43; 2: 10, 17, 18, 45). Howard Quarries has carried its burden of proof as required in Pasula, supra.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

The complaint of discrimination filed herein is dismissed with prejudice.


John J. Morris
Administrative Law Judge

Distribution:

Charles A. Harvey
139 North Euclid
Slater, Missouri 65349

E. J. Holland, Jr., Esq.
James T. Price, Esq.
Spencer, Fane, Britt & Browne
1000 Power & Light Building
Kansas City, Missouri 64105

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 24 1981

SECRETARY OF LABOR, MINE SAFETY AND)	
HEALTH ADMINISTRATION (MSHA), on behalf)	
of GORDON S. BENNETT, JAMIE V. COX,	)	COMPLAINT OF DISCRIMINATION
STEVEN R. FRITSCH, JAMES E. JOHNSON,)	
WILLIAM R. JOHNSON, ROBERT C. JOLLEY,)	
JAMES OLSEN, PAUL REDHAIR, LANSING L.	)	DOCKET NO. WEST 80-489-D(A)
SMITH, MICHAEL C. TATUM, FRED L. TUBBS,)	
and ROBERT R. WILSON,)	
Complainants,	)	MINE: Deseret Mine
)	
v.)	
)	
EMERY MINING CORPORATION,)	
)	
Respondent.)	

Appearances:

James H. Barkley, Esq., Office of Henry C. Mahlman,
Associate Regional Solicitor,
United States Department of Labor
Denver, Colorado 80294

For the Complainants

Todd D. Peterson, Esq.
Crowell & Moring,
Washington, D.C. 20036

For the Respondent

Before: Judge John J. Morris

DECISION

STATEMENT OF THE CASE

The Secretary of Labor of the United States, the individual charged with the statutory duty of enforcing the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act) brings this action on behalf of complainants. He asserts Emery Mining Corporation, (Emery), violated Section 115(b) of the Act. Further, the Secretary claims that the aforesaid violation constitutes discriminatory conduct under Section 105 (c)(1) of the Act.

Section 115 of the Act, now codified at 30 U.S.C. § 825(a) provides, in part, as follows:

MANDATORY HEALTH AND SAFETY TRAINING

Sec. 115. (a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instructions in the statutory rights of miners and their representatives under the Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

(c) Upon completion of each training program, each operator shall certify, on a form approved by the Secretary, that the miner has received the specified training in each subject area of the approved health and safety training plan. A certificate for each miner shall be maintained by the operator, and shall be available for inspection at the mine site, and a copy thereof shall be given to each miner at the completion of such training. When a miner leaves the operator's employ, he shall be entitled to a copy of his health and safety training certificates. False certification by an operator that training was given shall be punishable under section 110(a) and (f); and each health and safety training certificate shall indicate on its face, in bold letters, printed in a conspicuous manner the fact that such false certification is so punishable.

(d) The Secretary shall promulgate appropriate standards for safety and health training for coal or other mine construction workers.

Section 105(c)(1) of the Act, the discrimination section, now codified at 30 U.S.C. § 815(c)(1) provides as follows:

§ 105(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject

to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits was held in Salt Lake City, Utah on March 17, 1981. The parties filed post trial briefs.

ISSUES

The initial issue is whether Emery's requirement that a job applicant have 32 hours of miner training as a precondition of employment violates Section 115, the training section of the Act. If the first issue is answered in the affirmative, does such a violation trigger a violation of Section 105(c)(1), the discrimination section of the Act. If a violation of both sections occurred, what relief is appropriate particularly since the Secretary in his complaint did not seek a civil penalty.

For the reasons herein stated I conclude that Emery's policy violates the Act, constitutes discriminatory practice, and I further assess a civil penalty.

SYNOPSIS OF THE CLAIMS

Complainants, all inexperienced in mining, sought employment with Emery. Before considering any applications Emery's personnel policy requires that all job applicants complete 32 hours of training at an MSHA approved miner's training course. The applicants at their expense successfully completed the training courses. Their references were checked by Emery, and after physical examinations they were hired.

The Secretary contends that Emery's policy violates Section 115(b) of the Act. On behalf of complainants he seeks to recoup all expenses attendant to their taking the training course as well as pay not received while they were attending the course.

FINDINGS OF FACT

The facts are uncontroverted.

1. Jamie V. Cox initially contacted Emery for employment. Emery personnel told him to contact Job Service.^{1/} At that agency he was advised to take 32 hours of miner training. Cox took the training and applied at Emery. His references were good and he was hired by Emery on January 28, 1980, as a buggy driver (underground). Cox received an additional 8 hours of miner training from Emery.

Cox's expenses consisted of the following:

Tuition for 32 hour course	\$100.00
Miles travelled to attend course (256 miles at 18 1/2¢) ^{2/}	47.36
Pay not received (\$65.78 x 4 days)	263.12

Cox had no prior underground mining experience (Tr. 29-39, 78).

2. James Olsen contacted Emery personnel. He was referred to Job Service and took the MSA 32 hour training course. His starting pay as a miner was \$65.78 per day.

Olsen started with Emery on March 21, 1980, operating a shuttle car underground. After he was hired Olsen received 8 hours training from Emery.

Olsen's expenses were as follows:

Tuition at MSA	\$100.00
(Mileage, 480 @ 18 1/2¢)	88.80
Pay not received (\$65.78 x 4)	263.12

Olsen had no prior mining experience (Tr. 40-44).

3. When Paul Redhair contacted Emery's personnel secretary he was told he needed 32 hours of training to work underground. Redhair took the training course and after returning to Job Service he was interviewed by Emery. He was hired on February 1, 1980, as an underground worker.

Redhair's expenses were as follows:

Tuition for training	\$100.00
Pay not received (\$65.78 x 4)	263.12

Redhair had no prior mining experience.

^{1/} The parties stipulated that Job Service is an agency of the State of Utah Department of Employment Security (Tr. 34).

^{2/} The undersigned has calculated all mileage expense on the basis of mileage paid by the United States Government for government use of privately owned vehicles at the time of the use.

4. James E. Johnson contacted Job Service who directed him to the safety training course. After completing the course he returned to Emery where he received an additional 8 hours of training.

Johnson's expenses were as follows:

Tuition for miner training at MSA	\$100.00
Meals during training	36.00
Motel cost per night (\$36 x 4)	144.00
Mileage (168 x 18 1/2¢)	31.08
Pay not received (\$65.78 x 4)	263.12
Helmet	11.00
Boots	65.00
Belt	13.00

The record does not reflect that the helmet, boots, and belt were required by Emery as a precondition of employment. Accordingly, I conclude that he should not recover for the expense of such items.

Johnson was employed as an underground miner on February 22, 1980. He had no prior mining experience (Tr. 51-53).

5. William R. Johnson was told by Job Service that employment would be more easily obtained if he had miner's training. Johnson took the 32 hour course and returned to Job Service. He was then referred to Emery, took a physical examination, and was hired on February 22, 1980. Johnson's first job was as an underground trainee laborer.

William R. Johnson's expenses were as follows:

Tuition for training	\$100.00
Motel cost (\$36 x 4)	144.00
Mileage (160 @ 18 1/2¢)	29.60
Pay not received (\$65.78 x 4)	263.12
Meals	36.00

William R. Johnson had no prior mining experience (Tr. 54-56).

6. Fred L. Tubbs went to Job Service where he was told he needed miner training. He took the course, went back to Job Service, then to Emery. At Emery he was interviewed and took a physical examination.

Fred L. Tubbs' expenses were as follows:

Tuition for training	\$100.00
Mileage (124 x 4 x 18 1/2¢)	91.76
Lunches during course	8.50
Pay not received (\$65.78 x 4)	263.12

Tubbs was employed by Emery on February 8, 1980 as an underground miner. He had no prior mining experience (Tr. 56-60).

7. Lansing L. Smith was told by Emery that he would have to take the 32 hour training course. Emery stated that after completing the course he would be hired. Smith took the training course at Snow College in Utah.

Smith's expenses were as follows:

Tuition for training classes	\$ 65.00
Mileage (100 miles x 4 days x 18 1/2¢)	74.00
Pay not received (\$65.78 x 4)	263.12

Smith started with Emery on February 22, 1980 as an underground miner. He had no prior experience (Tr. 61-67).

8. Robert T. Wilson went to Emery and saw the Emery sign referring applicants to Job Service. Wilson was told by Emery's assistant personnel director that it would speed the hiring process if he took the course. He took the 8 hour per day course for four days.

Wilson's expenses were as follows:

Tuition for training course	\$ 54.00
Pay not received (\$68 x 4)	272.00

9. The parties stipulated that four complainants were out of town and unavailable for the hearing. It was further agreed that Emery did not compensate said complainants for the time they spent obtaining pre-employment training. The complainants subject to this stipulation were Gordon S. Bennett, Steven R. Fritsch, Robert C. Jolley, and Michael C. Tatum (Tr. 5-6). (If the parties intended a stipulation greater in scope they did not express it on the record.)

Based on the stipulation I enter the following findings of fact:

Complainants Bennett, Fritsch, Jolley, and Tatum did not receive their pay for the four days they spent attending the miner training course. The amount of the pay not received was as follows:

Gordon S. Bennett	\$65.78 (starting pay) x 4 days	\$263.12
Steven R. Fritsch	\$65.78 x 4	263.12
Robert C. Jolley	\$65.78 x 4	263.12
Michael C. Tatum	\$65.78 x 4	263.12

10. Prior to the 1977 Act Emery hired new miners and sent them to the College of Eastern Utah. The new miners were given an additional two days training at Emery's facilities (Tr. 80).

11. During 1979 Emery experienced a 48% turnover in inexperienced miners; 450 were hired and 190 terminated in the first 3 months (Tr. 81-82).

12. On January 1, 1980 Emery changed its policy. The new policy was that no person would be hired unless he had completed a new miner orientation program through an MSHA approved institution (Tr. 82).

13. The reason for Emery's change in personnel policy was to screen out those persons who weren't interested in a mining career and thereby reduce the turnover rate (Tr. 89, 96).

14. The turnover rate was reduced to 25% from 50% but Emery did not identify the cause of the reduction (Tr. 86, 89, 90).

15. Before January 1, 1980 Emery paid the miners for their time in taking the training course (Tr. 88).

16. The State of Utah was the prime mover for the training program. Its purpose was to reduce turnover (Tr. 92, 93).

DISCUSSION

Emery contends it may impose legitimate pre-employment qualifications on those who wish to be employed at its mines. I agree. However, the legitimacy of Emery's policies depends on whether a pre-employment requirement of 32 hours of miner's training conflicts with a contrary Congressional directive. Accordingly, it is necessary to look to the terms of the Act and, if necessary, its legislative history.

Various portions of the Act dealing with miner training are profuse in indicating a Congressional intent that miner training is the responsibility of the operator and not the job applicant.

A review of Section 115(a) indicates such a Congressional intent. An overview of the section shows: "Each operator shall have a health and safety training program. ..." [30 U.S.C. 825(a)]. New miners having no underground mining experience shall receive no less than 40 hours of training [30 U.S.C. 825(i)] which "shall be provided during normal working hours [30 U.S.C. 825(b)]. In the instant case the applicants who took the course did so on their own time and not during any such normal working hours. Section 115(b) also directs that "miners shall be paid at their normal rate of compensation while they take such training and new miners shall be paid at their "starting wage" when they take the new miner training. If such training is given at a location other than the normal place of work miners shall also "be compensated for the additional costs they may incur in attending such training sessions." [30 U.S.C. 115(b)].

None of the above conditions were met in the instant factual situation. The applicants did not receive any compensation, a starting wage or otherwise, for their 32 hours training course. In fact they paid their own tuition, and they incurred additional incidental costs for which they were not reimbursed.

Section 115(c) directs that upon completion of each training course "the operator" shall certify that the miner has received the training [30 U.S.C. 115(c)]. The certificate shall be maintained "by the operator".... False certification "by an operator" is punishable under both the civil and criminal penalty provisions of the Act. [30 U.S.C. 825(c)]. (Emphasis added.)

As indicated above the Act places the responsibility for the training of miners on the operator. On the other hand, no portion of the Act places the responsibility for training costs on new miners. Emery's pre-employment condition clearly shifts the statutory burden from Emery, the operator, to the job applicants. Although operators may enter into cooperative training agreements (30 C.F.R. 48.4), they ultimately are responsible for the cost and content of such training.

In addition to the foregoing language in the statute, the legislative history supports this construction. The Committee on Human Resources in May, 1977 stated:

It is not the Committee's contemplation that the Secretary be in the business of training miners. This is clearly the responsibility of the operator, as long as such training meets the Act's minimum requirements. Sen. Rep. No. 95-181, 95th Cong., 1st Sess., 50 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session, 638, (July, 1978).

Further, the general tenor of Senate Report No. 95-461, 95th Cong., 1st Sess., 61 (1977), reprinted in Leg. History, supra at 1339, clearly illustrates the Congressional intent. A particularly relevant portion of this legislative history reads as follows:

MANDATORY HEALTH AND SAFETY
TRAINING AND MINE RESCUE TEAMS

The Senate bill contained a provision requiring the Secretary to, within 180 days of the effective date of this, promulgate regulations with respect to the safety and health training of miners. Each operator would have a safety and health training plan, approved by the Secretary, which would provide new underground miners with no less than 40 hours of training, new surface miners with no less than 24 hours of training, and all miners with at least 8 hours of annual retraining. Any miner reassigned to a new task would be provided with training in safety and health aspects of his new assignment. Safety and health training would be provided at the expense of the

operator^{3/} and during normal working hours. Miners would be paid their normal rate of compensation for such time spent in training; and new miners would be paid their starting wage rate. If such training was given away from the mine, miners would also be compensated for their expense.

Other portions of the legislative history amply support the construction stated here.

The next issue is whether the violation constitutes a discriminatory practice under Section 105(c) of the Act. The discrimination section is broad in scope and it includes and prohibits discrimination against an "applicant for employment." In David Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (1980) (Reversed on other grounds, United States Court of Appeals, (3rd Cir), October 30, 1981, No. 80-2600), the Commission cited the report of the Senate Committee that largely drafted the 1977 Mine Act. The Commission citing in part the legislative history at 624, stated as follows:

The wording of section 10[5](c) is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.

The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions ... or the enforcement of those provisions....
(Emphasis added).

Since § 115(b) imposes the statutory obligation on the operator to provide and pay for miner training it follows as a necessary corollary that the right to training as a miner is one of the statutory rights protected by the discrimination portion of the Act. Emery's pre-employment policy which denied this right to the complainants, therefore, discriminates against job applicants.

The Committee was cognizant of the possibility of pre-employment training in areas other than as a pre-employment condition. The Legislative History, supra, page 639 recognizes West Virginia and Kentucky safety training courses and discusses their ramifications:

The Committee recognizes that some States, namely West Virginia and Kentucky, provide pre-employment

MSHA brief.

training to individuals who may apply for jobs as miners. Such training may meet the requirements of the standards promulgated by the Secretary, and, assuming that such training is of sufficient quality, the operator should not be required to duplicate State-provided training.

In the above circumstances there is a Congressional intent to relieve the operator from the liability of providing duplicate training for a job applicant. Emery has not cited any portion of the legislative history that would cause me to conclude that there are other circumstances where Congress intended to shift the burden from the mine operator.

The doctrine expressed in Consolidated Coal Company, (David Pasula), supra does not purport to set the outside perimeters of protected activity. In this case complainants were "applicants for employment." Further, the protected activity here is a statutory right to training provided for in the Act. Emery accordingly discriminated against complainants by requiring them to secure on their time and at their expense such training.

The Secretary's regulations, Title 30 Code of Federal Regulations, Part 48, relating to the training and retraining of miners, does not address the issues raised in this case.

EMERY'S CONTENTIONS

Emery argues that it may impose legitimate pre-employment qualifications, further that such a policy is consistent with the Act, and that there would be no practical benefit in requiring Emery to pay for all 40 hours of training since it may well continue its present personnel policy that is the subject of this litigation.

Emery's initial argument has already been discussed. To briefly restate the holding: Emery's pre-employment qualification fails since it is in conflict with the statutory provisions of the Act.

Emery's second argument is that its policy is consistent with the Act because the complainants were not "miners." Emery relies on Section 115(b) of the Act. With particular emphasis Emery cites the pay requirement section as follows:

Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional cost they may incur in attending such training sessions. (Emphasis added).

Further, Emery cites Section 3(g) of the Act which states:

(g) "miner" means an individual working in a coal or other mine.

In short, Emery asserts that the job applicants here were not "miners" since they had not been hired and most of them had not even submitted formal applications for employment. I find from the uncontroverted evidence that the factual statements made by Emery are credible, but I disagree with Emery's restrictive construction of the term "miner". Such a view conflicts with the Act and its legislative history which places the burden for the training of all miners on the mine operator. Further, it is an accepted principal of law that remedial legislation is to be broadly construed. Consolidated Coal Company, 1 FMSHRC 1300, 1309 (1979).

It is apparent from the legislative history Leg. History, supra at (pages 589-598) that Congress was exceedingly disturbed over mine disasters and resulting deaths. The history reviews the Sunshine Silver Mine Disaster (Idaho, 1972; 91 fatalities); Buffalo Creek (1972, 125 fatalities); Blackville disaster (July 1972, 9 fatalities); Scotia, (March 1976, 26 fatalities including 3 inspectors); near Tower City, Pennsylvania (February 1977, 9 fatalities). Further, the history states:

It is unacceptable that years after enactment of these mine safety laws, miners can still go into the mines without even rudimentary training in safety. Leg. History, supra at 592.

Emery's final argument is that if it is required to pay for all 40 hours of training it is unlikely that the miners will ultimately benefit from this additional burden placed on Emery. Its argument is to the effect that it could hire only "experienced miners", further, it could train the applicants at its facilities, and it could still require its job applicants to have completed 32 hours of training before it gives its own 40 hours of training.

I agree with Emery that it may restrict its hiring practices and hire only "experienced miners", as defined in 30 C.F.R. 48.2(b). In addition, Emery may use its present facilities to give the required 40 hours of training. In fact, prior to the adoption of the present Act Emery (then American Coal Company) had a full MSHA approved training course on its site. Further, it compensated new miners for their expenses and wages while they took the course (Tr. 6, 80, Exhibit C-1).

As I interpret Emery's final argument it focuses on the proposition that it may require inexperienced miners to take 32 hours of preliminary training and then give its own 40 hours of training (a total of 72 hours). There should be many avenues Emery can explore in its efforts to reduce labor turnover but its hypothetical presents a factual situation very similar to the pre-employment condition that I have ruled invalid in the instant case. However, in view of the fact that Emery's argument is hypothetical no definitive ruling is required in this decision.

Emery further claims that in Section 105(c) Congress used the term "applicants for employment" but that term does not appear in Section 115(b). Therefore, Emery concludes that Congress did not intend to require operators to compensate applicants for training they received prior to becoming hired by Emery.

No one contends Emery should train each and every job applicant but it may not discriminate against job applicants.

In Section 115(a) Congress is discussing "new miners" with no underground experience, § 115(a)(1); new miners with no surface experience § 115(a)(2); refresher training for all miners, § 115(a)(3); any miner reassigned to a new task, § 115(a)(4). It would be incongruous for Congress to require training for a "applicant for employment." If Congress had perceived the thrust of Emery's argument and required training for "applicants for employment" (in addition to new miners) then Emery might find itself in the miner training business which could be quite apart from the coal mining business.

Emery is correct in its contention that "applicants for employment" are not required to be trained at the expense of the mine operator. However, Congress mandated that mine operators bear the full expense of training new miners. Emery's policy that applicants for employment obtain 32 hours of training before they may be considered for employment circumvents this mandate. Emery constructed its employment policy in such a way that it remained responsible for only eight of the forty hours of training required for new underground miners. This policy clearly violates Section 115 of the Act.

Having considered all of the arguments herein on the uncontroverted facts I conclude that an order should be entered in favor of complainants granting the relief they seek.

PROCEDURAL MATTERS

At the hearing of the above case counsel for the Secretary indicated that he had been informed that there were approximately 300 employees in addition to complainants that were hired by Emery after its policy went into effect on January 1, 1980 (Tr. 22-28). The parties discussed the possibility of joining other similarly situated employees once they were specifically identified. The undersigned indicated that an amended complaint would be favorably considered and jurisdiction would be retained over those complainants who were added in the amended complaint. Subsequently leave was granted to the Secretary to file an amended complaint which adds 127 complainants. They seek reimbursement for tuition, back wages, and incidental expenses.

After the amended complaint was filed the undersigned, pursuant to Rule 21, FRCP, severed the amended complaint from the original complaint. It was further ordered that the instant case retain its present style and that the letter (A) be designated after the docket number.

The caption of the case involving the allegations raised in the amended petition was designed as follows:

SECRETARY OF LABOR, MINE SAFETY AND)	
HEALTH ADMINISTRATION (MSHA), on)	
behalf of MARK ADAMS, ET AL,	)	DOCKET NO. WEST 80-489-D(B)
)	
Complainant,)	
v.)	
)	
EMERY MINING CORPORATION,)	
)	
Respondent.)	

Further, a copy of the complete file in WEST 80-489-D(A) was transferred to WEST 80-489-D(B). The latter case remains pending before the undersigned.

CIVIL PENALTY

In this case the Secretary did not seek a civil penalty against Emery for the violation of Section 105(c) of the Act.

The credible evidence has been reviewed and the complaints of discrimination are affirmed. The Act provides that any violation of the discrimination section shall be subject to the provisions of Section 108 and 110(a).

The statute further authorizes the imposition of a penalty not to exceed \$10,000. (30 U.S.C. 818, 820(g), (i)). The Secretary did not seek a civil penalty in this case but the statute mandates the imposition of a penalty. Accordingly, a penalty of \$1,000 is assessed against respondent for violating the Act. (Cf Tazco, Inc. Va. 80-121 (August 1981)).

Based on the foregoing findings of fact and conclusions of law as stated above I enter the following:

ORDER

1. Complainants Gordon S. Bennett, Jamie V. Cox, Steven R. Fritsch, James E. Johnson, William R. Johnson, Robert C. Jolley, James Olsen, Paul Redhair, Lansing L. Smith, Michael C. Tatum, Robert R. Wilson and Fred L. Tubbs were unlawfully discriminated against in violation of Section 105(c) of the Act, and their complaints of discrimination are sustained.


2. Respondent is ordered to pay to each complainant the amount indicated after said complainant's name:

		TOTAL
Gordon S. Bennett		
Back pay	\$263.12	\$263.12

Jamie V. Cox		
Tuition	\$100.00	
Mileage	47.36	
Back pay	263.12	\$410.48
James Olsen		
Tuition	\$100.00	
Mileage	88.80	
Back pay	263.12	\$451.92
Steven R. Fritsch		
Back pay	\$263.12	\$263.12
Paul Redhair		
Tuition	\$100.00	
Back pay	263.12	\$363.12
Lansing L. Smith		
Tuition	\$ 65.00	
Mileage	74.00	
Back pay	263.12	\$402.12
Robert R. Wilson		
Tuition	\$ 54.00	
Back pay	272.00	\$326.00
Fred L. Tubbs		
Tuition	\$100.00	
Mileage	91.76	
Meals	8.50	
Back pay	263.12	\$463.38
Michael C. Tatum		
Back pay	\$263.12	\$263.12
James E. Johnson		
Tuition	\$100.00	
Incidental costs (meals & motel)	180.00	
Mileage	31.08	
Back pay	263.12	\$574.20
William R. Johnson		
Tuition	\$100.00	
Motel costs	144.00	
Mileage	29.60	
Back pay	263.12	
Meals	36.00	\$572.72
Robert C. Jolley		
Back pay	\$263.12	\$263.12

3. Respondent is to pay interest on all said back pay awards at the rate of 12 1/2% per annum.^{4/}

4. A civil penalty of \$1,000 is assessed against respondent for violating Section 105(c) of the Act.


John J. Morris
Administrative Law Judge

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^{4/} Interest rate used by Internal Revenue Service for underpayments and overpayments of tax, Rev Ruling 79-366 Cf. Florida Steel Corporation, 231 N.L.R.B. No. 117, 1977-78, CCH, N.L.R.B. Para 18,484; Bradley v. Belva Coal Company, WEVA 80-708-D, April 1981.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 24 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 81-550
Petitioner	:	A.O. No. 46-04266-03019V
	:	
v.	:	Meredith Mine
	:	
BULL RUN MINING COMPANY, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), proposing a civil penalty assessment for one alleged violation of mandatory safety standard 30 CFR 75.200.

Respondent filed a timely answer and notice of contest and the case was scheduled for hearing at Washington, Pennsylvania, January 14, 1982. However, by motion filed November 18, 1981, the petitioner seeks approval of a proposed settlement of \$350 for the citation which was initially assessed at \$750.

Discussion

In support of the proposed settlement disposition of this case, petitioner has submitted full arguments and information concerning the six statutory criteria found in section 110(i) of the Act, including a discussion of the facts and circumstances surrounding the citation. Petitioner states that Citation No. 856023 was issued on March 26, 1981, because the respondent failed to comply with the roof control requirement that roof bolts be installed within 5 feet of the rib. In the 1 right section, in the crosscut along the belt conveyor entry, the crew had cut an area along the left rib for a distance of 18 feet and no support had been installed. The distance from the rib to the installed bolts was 6 feet 10 inches, 6 feet 7 inches, 7 feet 4 inches, and 8 feet 2 inches. Petitioner states further that a reduction in penalty would be appropriate in light of the following facts.

The cited area had been originally cut and bolted according to the roof control plan; however, on March 25, 1981, it was discovered that the equipment was too wide to move into the area. Thus, a cut was made in the corner resulting in the cited wide areas from the last row of bolts.

Except for this last row of bolts the entire crosscut had been properly bolted. The crew, after making the cut, cleaned the area. However, before the crew could bolt the shift ended.

The next day the crew immediately started cutting in another area of the mine, and at the time this violation was observed no one had been under the inadequately supported roof. Additionally, the cited roof could not be pulled down, and in order to abate, the roof was pinned up with additional bolts, and it was not likely that the roof would have fallen in this area. Petitioner concludes that these factors reduce the gravity of the violation, and that the probability of a roof fall was certainly less than probable in light of the roof's condition. Petitioner also asserts that the cited condition presented no danger of an immediate roof fall, that no fatality could reasonably be expected to occur as a result of this condition since no miners were exposed to this unsupported area, because once the crew finished work at the cited area on March 25, 1981, they commenced work in another area of the mine the next day.

Although petitioner concedes that the respondent was negligent in permitting the cited conditions to exist, it argues that any negligence is mitigated by the fact that the conditions cited had not existed for an entire shift as previously believed since the condition were cited approximately 2 hours and 50 minutes into the shift.

With regard to the size and scope of the respondent's mining operation, petitioner states that the respondent operates a very small mine, employing approximately 16 miners on one daily production shift, and that its annual coal production is 77,830 tons. Respondent's history of prior violations for a two year period prior to the date the instant citation issued consists of 57 prior assessed violations, but the petitioner does not assert that any of these were for prior violations of section 75.200.

Conclusion

After careful review and consideration of the pleadings, arguments, and information of record in support of the motion to approve the proposed settlement. I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion is GRANTED and the settlement is APPROVED.

*/ Lest there be any misunderstanding as a result of recent conclusions made by one of my learned colleagues in a recent decision of November 17, 1981, (Docket Nos. WEVA 81-341-R; WEVA 81-441), stating that the Commission's "trial judges" have been admonished to adopt a "wise" rather than "zealous" attitude toward mine safety enforcement, my decision approving the settlement in this case is based on the record before me and I have not been the recipient of any such "admonishments".

ORDER

Respondent IS ORDERED to pay a civil penalty in the settlement amount of \$350 in satisfaction of the citation in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by MSHA, this proceeding is DISMISSED. The scheduled hearing is CANCELLED.



George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 27 1991

WESTERN STEEL CORPORATION)	
Substituted Contestant,)	
(FMC CORPORATION, Original Contestant))	)	CONTEST OF CITATION PROCEEDING
)	
v.	)	DOCKET NO. WEST 81-132-RM
)	
SECRETARY OF LABOR, MINE SAFETY AND)	Citation No. 577232
HEALTH ADMINISTRATION (MSHA),)	
Respondent.)	MINE: FMC
)	

Appearances:

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For the Respondent

BENCH DECISION

Contestant filed a contest of Citation No. 577232 issued by respondent on behalf of the Mine Safety and Health Administration (MSHA). A hearing was held in Green River, Wyoming on September 1, 1981. At the conclusion of the evidence the parties agreed to waive filing of post trial briefs and agreed that a bench decision could be rendered.

Based on the evidence I entered the following bench decision:

JURISDICTION

The parties admit that the Federal Mine Safety and Health Review Commission has jurisdiction to hear and determine this case.

PROCEDURAL MATTERS

Western Steel Corporation has been substituted as a Contestant in this case without objection. Accordingly the case is dismissed as against FMC Corporation, and the caption is amended to reflect the substitution.

STATEMENT OF THE CASE

Contestant seeks an order vacating Citation 577232 issued by the Mine Safety and Health Administration for an alleged violation of Title 30 Code of Federal Regulations, section 57.4-33. The standard provides as follows:

Valves on oxygen and acetylene tanks shall be kept closed when contents are not being used.

ISSUE

The issue is whether Contestant violated the standard. That issue involves a construction of the regulation.

FINDINGS OF FACT

The facts are uncontroverted except as will be hereafter discussed. I find the credible facts to be as follows:

1. On December 3, 1980, witness Warner, a Western Steel iron worker, was fabricating material at the FMC mine.

2. Witness Warner was putting in a dust control system. A torch welder with acetylene and oxygen tanks was being used in connection with the process.

3. Mr. Warner arrived to work on that date at about 8:00 a.m. He set up his cutting tools and turned on the valves and started up the welder.

4. The torch had approximately a hundred feet of hose which led to the acetylene and oxygen tanks.

5. During the process of the morning, witness Warner ran out of angle iron that he was using to make brackets. It was necessary to go elsewhere, approximately forty to fifty feet away, to cut additional pieces.

6. At the place where witness Warner was cutting additional pieces he could not see the torch or the acetylene and oxygen tanks.

7. Mr. Warner testified that he was away for approximately five to ten minutes from the torch cutting head before the inspection team arrived. However, I further find that this time could be as long as twenty minutes, and for the purpose of this discussion I accept the twenty-minute period.

8. There were two sets of shut-off valves. One set was at the oxygen and acetylene tanks and one set was 100 feet away at the torch.

9. When witness Warner left he turned off the set of shut-off valves that are located at the torch head itself.

10. Mr. Warner intended to turn off the valves at the acetylene and oxygen tanks at the lunch break.

Based on the foregoing facts, I conclude that there was no violation of the regulations, and the citation should be vacated.

DISCUSSION OF THE EVIDENCE

There's only one credibility determination in the case and that involves testimony of MSHA Inspector Potter to the effect that he learned while at the scene and before he issued the citation that the torch had not been in use. He bases this testimony on statements made by three miners at the time of the incident. I find a certain weakness in Mr. Potter's testimony in that I could not determine whether those three witnesses were stating that they themselves had not used the torch or whether they were stating that someone else had not used the torch.

In addition, witness Potter confirms that the torch had been in use at some time. I further find that Warner started at 8:00 a.m. and set up his gear and began operating the torch. He had done so between the time that he started at 8:00 a.m. and the time of the inspection at about 10:35 a.m.

The Mine Safety and Health Administration asserts that there was a hazard because the lines were under pressure and there was a possibility then that an explosion could have occurred. There's no evidence that such an event could have occurred, and no evidence that the lines were in any way weak. In any event, I am not convinced that Warner's actions created any hazard because that condition will always exist whenever the lines are in use. I further find that MSHA Inspector Potter appears to agree that MSHA allows valves to be open for a lapse of time when a worker has to do such a thing elsewhere such as get a piece of steel.

The defense here infers that 'in use' means being used at various times throughout the day. There are certain defects in that approach because then no one would be responsible for turning the valve off. The possibility would exist that the first person coming on the scene would use the torch for five minutes and then walk away. Then it wouldn't be turned off until lunch time or the end of the day. I am not willing to go so far as to rule that the valves could be left on for such a substantial period of time.

Here I find that Mr. Warner left his work place near the torch, and he was doing an activity in connection with the further use of that torch. He was gone for a period not exceeding twenty minutes. Therefore, it is my view that the contents of the oxygen and acetylene torches were still "being used" during this twenty minute period. Therefore, there was no violation of the subsection 57.4-33. For that reason, I conclude that Citation 577232 should be vacated.

I can see the Secretary of Labor's point, but I feel that if he wants a more specific requirement, then he should redraft Section 57.4-33. An employer is entitled to be fairly appraised of prohibitive activity. It may well be that Contestant in this case would be denied due process if I were to hold that these facts constitute a violation of the standard.

In summary, I feel that there could be two extremes involved in a construction of the regulation. One extreme is that the tank contents are not "being used" whenever the oxygen and acetylene are flowing through the lines but the torch itself has been turned off. I'm unwilling to accept that extreme construction because that would mean everytime a welder turned off his torch, he would have to go elsewhere to shut off the oxygen and acetylene. On the other hand, the other extreme would be if a worker used it for five minutes at 8:00 a.m. in the morning and then did not thereafter go back to the welder for a substantial period of time, the contents of the tank would be considered to be "being used" during that time. I do not accept either of these interpretations.

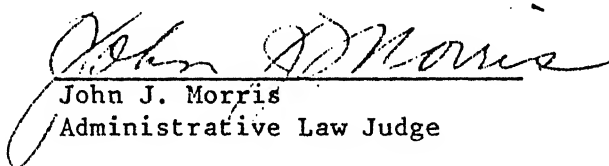
ORDER

For the foregoing reasons and based on the findings of fact and conclusions of law, I enter the following order:

Citation 577232 and the proposed penalty are vacated.

POST TRIAL ORDER

The foregoing bench decision is affirmed.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 27 1981

PEABODY COAL COMPANY,	:	Contest of Citation
	:	
Contestant	:	
	:	Docket No. KENT 81-92-R
v.	:	
	:	
SECRETARY OF LABOR,	:	Citation No. 1032760
MINE SAFETY AND HEALTH	:	February 2, 1981
ADMINISTRATION (MSHA),	:	
	:	Star North Underground Mine
	:	
UNITED MINE WORKERS OF AMERICA,	:	
(UMWA),	:	
	:	
Respondents	:	
	:	
	:	
	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 81-155
	:	A.O. No. 15-03161-03075V
Petitioner	:	
v.	:	
	:	Star North Underground Mine
PEABODY COAL COMPANY,	:	
	:	
Respondent	:	

DECISIONS

Appearances: Thomas A. Gallagher, Esq., St. Louis, Missouri, for
contestant-respondent Peabody Coal Company;
Thomas A. Grooms, Esq., U.S. Department of Labor,
Nashville, Tennessee, for respondent-petitioner
Secretary of Labor.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern an unwarrantable failure citation served on Peabody Coal Company by an MSHA inspector pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, and a subsequent

civil penalty proposal filed by MSHA pursuant to section 110(a) of the Act, seeking a civil penalty assessment based on the alleged violation as described in the citation.

Peabody filed a timely notice of contest challenging the inspector's unwarrantable failure findings, as well as his finding that the citation was significant and substantial. On motion by MSHA, the dockets were consolidated for hearing at Nashville, Tennessee, on September 2, 1981, and MSHA and Peabody appeared, but the UMWA did not.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4):

1. The Administrative Law Judge has jurisdiction over these matters.
2. Peabody Coal Company engages in business which affects interstate commerce.
3. Peabody Coal Company is a large coal operator.
4. The amount of the penalty which may be imposed will not affect Peabody Coal Company's ability to remain in business.

Issues

The issues presented in these proceedings includes the following: (1) whether the conditions or practices cited by the inspector on the face of the citation constituted a violation of the cited mandatory safety standard, (2) whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other safety or health hazard, and if such violation was caused by the unwarrantable failure of the operator to comply with the mandatory health or safety standard, (3) the appropriate civil penalty which should be assessed against the operator for

the alleged violation based upon the criteria set forth in section 110 of the Act. Additional issues raised are identified and disposed of where appropriate in the course of these decisions.

DISCUSSION

Section 104(d)(1) Citation No. 1032760, issued by MSHA inspector Arthur J. Parks, on February 2, 1981, charges a violation of 30 C.F.R. § 75.1306, and the inspector concluded that the conditions cited constituted a "significant and substantial" violation. The citation was issued because the inspector believed that the explosive magazine on the No. 7 mining unit was not adequately protected from a potential roof fall. The condition or practice cited by the inspector on the face of the citation is as follows:

The explosives magazine on the No. 7 unit (025) was not adequately protected from potential roof fall. The magazine was sitting in a room neck (approximately 10' deep) next to intersection (spad No. 246) approximately 25' outby a roof fall in the No. 6 entry. The roof was cracked from the fall along the rib into the room neck and a crack from the fall extended [sic] into the crosscut opposite the magazine (this crosscut was 24' wide at the mouth). Management knew of the abnormal condition (the roof fall) but there were only three timbers set around the magazine and one of the three cross-bars between the magazine and fall was broken.

The conditions cited were subsequently abated, and the citation was terminated the same day it was issued, and the action taken to abate the conditions is described by the inspector as follows: "The area was timbered and the magazine was moved to another area."

MSHA's Testimony and Evidence

MSHA inspector Arthur J. Parks testified that he issued the citation in question on February 2, 1981, after he observed a magazine containing explosives situated close to a massive roof fall which had occurred in the No. 7 unit of the No. 6 entry. He stated that at least 8 feet of the roof had caved in and a mixture of both small and large rocks had broken off. The inspector pointed to a diagram showing the location of the violation which he had prepared from his notes after issuing the citation (Exh. G-2). He indicated that the section magazine was sitting in a room neck that was about 10 feet deep and 18 feet wide. There were three timbers positioned around the magazine. Mr. Parks stated that there were cracks which ran directly from the roof fall into the area where the magazine was located. One fracture ran almost 25 feet from the brow of the roof fall to near the magazine. He also pointed to a fracture on the right side of the diagram which was about 12 to 14 feet long. He testified that these fractures indicated that the roof was about to fall. In his opinion, the fractures were not caused by a cutting machine or other instrument. He stated that the cutting machine marks located on the rib opposite the magazine were distinguishable from the fractures (Tr. 7-17).

Mr. Parks referred to a previously issued imminent-danger order issued on December 22, 1980, for a violation of the roof-control plan (Exh. G-7). In describing the conditions which led to him issuing that order, he stated that Jesse Campbell, the foreman, had acknowledged that the roof was in extremely bad condition but that they were proud of the fact that no one had been injured due to rock falls. The inspector stated that he was worried about the attitude of the mine's management because they would wait until the roof started to break up before bolting it or timbering it (Tr. 37-41).

Mr. Parks explained the notations on Exhibit G-5 which showed the location of prior orders and citations issued in connection with rock falls and also showed the location of the rock falls that were reported. He indicated that these roof condition violations had all occurred in the same general area where the citation in question occurred (Tr. 43-44).

On cross-examination, Mr. Parks admitted that his diagram of the violation (Exh. G-2) was not to scale and that he had not actually measured the cracks. He agreed that the diagram showed that there were two crossbars outby the brow of the fall and that this would be sufficient support under the roof-control plan. The inspector testified that the plan required a minimum of 36-inch roof bolts and that the operator was using 48-inch resin bolts in the room neck (Tr. 67-72).

Mr. Parks stated that the three timbers around the magazine provided additional support but not adequate protection for the magazine. He felt that additional timbers in front of the crossbars were needed. He also thought that the intersection leading to the magazine should only be wide enough to let a scoop in to retrieve the magazine (Tr. 72).

Mr. Parks confirmed that a preshift inspection had taken place on February 2, 1981. He also testified that management corrected the cited condition as expediently as possible. He admitted that he had not checked the timbers surrounding the powder magazine to see if they were snug. He agreed that if in fact the roof was coming down, the timbers would have been firmly in place. The inspector also stated that he had not asked Mr. Todd why he located the magazine in this particular position (Tr. 74-92).

On redirect examination, Mr. Parks noted that the roof-control plan specifications were only a minimum and that additional precautions were necessary for abnormal conditions. He felt that the conditions of February 2, 1981, necessitated additional support. He stated that there was just 18 inches of clearance over the top of the powder magazine (Tr. 93-94, 140). He agreed that the three posts in front of the magazine provided additional support. He also admitted that the ribs provided some support (Tr. 94, 143).

In response to bench questioning, Mr. Parks stated that he did not know whether the roof had cracked before it had fallen. The roof fall had been

reported on February 1, 1981. He stated that he would not have issued any citations if the fallen crossbars had been in place, the entryway had been 20 feet instead of 24 feet wide, and the powder magazine had not been underneath the roof fall (Tr. 104, 135-139).

Jeffrey Bivens, representative of the union, testified that he accompanied Inspector Parks on his inspection of the mine on February 2, 1981. He testified that he observed the powder magazine which had two timbers on one side of it and one on the other. He noticed cracks running from the rock fall into the room neck where the magazine was situated, and thought that the fractures were caused by the weight of the roof breaking rather than by a cutting machine. He noted that machines make very distinct markings unlike fractures. In his opinion, the powder magazine was not adequately protected from a roof fall, and that there were considerable problems with the roof conditions in this area. At times, the roof would fall before it could be supported (Tr. 106-110).

Mr. Bivens described the powder magazine as being a 5-foot by 8-foot wooden box. It had a partition on one end with one section used for storing electric detonators. The rest of the box was used for storing the actual powder. The magazine was moved around the mine by a scoop. He had never observed this particular magazine in this position prior to February 2, 1981, although he had seen similar magazines stored in other niches with posts around them. In these other areas, when there were adverse roof conditions, extra steps had been taken to protect the magazines. He did not know whether the three posts surrounding the magazine in question had been installed in connection with the roof fall or prior to it (Tr. 116-120).

Charles Willis, a member of the safety committee, testified that he was shown all the conditions, including the cracks and the roof fall, which led to issuance of the citation in question. He stated that he has been around underground mining for about 22 years, although he does not work underground. Mr. Willis testified that the fractures were probably caused by the stress of the fall when it took weight in the entry. He stated that a cutting machine would make a wide, straight cut and that these cracks were circular and narrow. Mr. Willis testified that he was aware of problems with the roof and that No. 7 unit was having more problems than the other units at the time (Tr. 123-128).

Operator's Testimony and Evidence

Finis Todd, a section foreman for Peabody Coal Company, testified that he had arrived at the No. 7 unit around 4 o'clock on February 2. After making an onshift examination and noting that the powder magazine was in "good shape and adequately protected," he was told that Inspector Parks and Jim Young wanted to see the powder box. Upon finding Mr. Parks, he was told about some voltage cable violations. After correcting these, he returned to the No. 6 entry and saw Jim Young setting up a row of timbers across the intersection, as part of the additional support ordered by the inspector. Mr. Todd testified that he then found Mr. Parks in the crosscut between the

No. 2 and No. 3 entries and was shown some cracks which needed bolting or timbering before he could run the entry. Since he did not have a trussbolt operator, Mr. Todd decided to move the unit to the rooms on the return side. He ordered the scoop operator to knock the timbers out and remove the powder magazine from the room neck in the No. 6 entry. Mr. Todd described the powder box as being 6 feet wide and 8 feet long and 36 inches in height, and it was located about 4 feet from the intersection. After informing Mr. Parks of his action, the inspector told him he was issuing a section 104(d)(1) order on the powder magazine even though he had moved it. Mr. Todd stated that he was baffled because it was the first time that he knew anything about the citation on the powder magazine (Tr. 145-157).

Mr. Todd testified that the rock fall in the No. 6 entry posed no danger to the powder magazine. The roof had been crossbarred prior to the rockfall and the area outby the crossbars was hard and sounded good. He indicated that the cracks on the left side of the entry were small and did not run toward the powder box while the cracks on the right side were caused by the cutter bar butting the roof while cutting the corner of the inby rib. Mr. Todd testified that the area of the roof fall was in conformance with the roof control plan except for the wide crosscut. He stated that this wide area did not constitute any danger to the powder magazine sitting in the room neck. The powder magazine also had the face and left rib of the room neck for support (Tr. 158-169).

Mr. Todd testified that the roof was draw rock and that it would crack up as soon as coal was extracted or even a week afterwards. He indicated that header boards on each pin were used to keep the draw rock from breaking up, and that they had discovered a pattern of slips in the roof from the roof falls which had occurred earlier in the year. In the No. 6 entry they noticed water leaking in the top and had set two rows of timbers down the middle of it (Tr. 167-179).

On cross examination, Mr. Todd admitted that the face and rib support around the powder box would not help if the roof fell. He also stated that the magazine was not literally snug against the corner since a timber separated the magazine from the back wall. He testified that the pattern of slips was used to predict the next area of slips. Once they found the top breaking up they would trussbolt it. He stated that the February 2 fall was impossible to predict since the only indication of bad condition was the water coming out of the top (Tr. 190-196).

Jim Allen, safety manager for Peabody Coal testified that he had prepared respondent's Exhibit 4 showing the area of the roof fall in the No. 6 entry. He had investigated the circumstances surrounding the issuance of the 104(d)(1) order and took down measurements and observed the roof conditions. Mr. Allen stated that the mouth of the crosscut measured 25 feet and that this was a violation of the roof control plan. He testified that the timbers around the powder box was a practice initiated under an old enforcement policy which was no longer in effect (Tr. 230-334).

On recall, Mr. Parks testified that he did not dispute Mr. Todd's testimony that one rib was deliberately cut down with a cutting machine. He agreed that it was sheared by the machine to allow the shuttle car to come around it. He indicated that the stress cut ran through the crack made by the cutter, and was bad enough to indicate a potential roof fall (Tr. 260-261).

Findings and Conclusions

Contestant has challenged the section 104(d)(1) Citation No. 1032760 issued to it for an alleged violation of 30 C.F.R. § 75.1306. Section 104(d)(1) of the Act provides in part, that

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

Therefore, in order for the citation in question to be valid, MSHA bears the burden of showing that a violation of 30 C.F.R. § 75.1306 existed, that it was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and it was caused by the unwarrantable failure of the operator.

Fact of Violation

Peabody Coal Company is charged with a violation of 30 C.F.R. § 75.1306, which provides as follows:

When supplies of explosives and detonators for use in one or more working sections are stored underground, they shall be kept in section boxes or magazines of substantial construction with no metal exposed on the inside, located at least 25 feet from roadways and power wires, and in a dry, well rockdusted location protected from falls of roof, except in pitching beds, where it is not possible to comply with the location requirement, such boxes shall be placed in niches cut into the solid coal or rock.

Under this standard, MSHA must show first that the powder magazine in question was located in an area where there was a possible danger of a roof fall. Once this fact is established, the Secretary must prove that the magazine was not adequately protected from a potential roof fall.

The evidence of record indicates that the No. 7 unit, in which the alleged violation occurred, was the site of five reported roof falls in the previous 4 months (Exhs. G-6 and G-7). The most recent roof fall of February 1, 1981, had taken place next to an intersection which bordered the roomneck in which the powder magazine was located. Cracks and deteriorated roof were visible and extended from the area of the roof fall into the roomneck containing explosives. While the operator contends that these roof fractures were caused by a cutting machine rather than by the stress of the roof fall, the testimony and evidence supports an opposite conclusion. The inspector stated that the cracks originated at the brow of the fall and ran almost 25 feet to the magazine. Jeffrey Bevins substantiated this observation. Mr. Willis testified that they had been having problems with the roof in No. 7 unit and that he had been shown the cracks by Mr. Parks on February 3, 1981. Additionally, he described the cracks as being narrow and noted that those made by cutting machines are usually 6 to 7 inches wide. Mr. Bevins also indicated that cutting machine fractures were very distinct from stress fractures. Therefore, even though Mr. Todd asserted that there was only a small stress crack which did not run toward the powder box and another crack which had been caused by a cutter bar, the preponderance of the evidence warrants the conclusion that the roof near the powder box contained deteriorated or fractured roof. The description of the cracks, their location, and the inspector's familiarity with roof conditions and potential problems indicates that there was a possible danger of a roof fall in the area where the powder magazine was located.

The issue then becomes whether the magazine was adequately protected from a roof fall. While Mr. Todd initially contended that the face and left rib of the room neck provided support for the powder magazine, he later admitted that these surfaces would give no protection in the event of a roof fall. Roof bolts but not crossbars had been placed in the roof over the powder magazine. The three timbers that surrounded the explosive's box provided the only protection for it. Considering the history of roof falls in this entry and the fact that the inspector cited the operator with a violation of the roof control plan on this same day near the same intersection shared by the roomneck in question, the operator should have provided the powder magazine with additional protection. The method of abatement which included timbering and correcting the wide entry in the intersection indicates that such additional protection was possible. Under the circumstances of this case, I find that MSHA has established by a preponderance of the evidence that there was a danger of a roof fall and that the powder magazine was not adequately protected. Accordingly, a violation of section 75.1306 has been established and the citation is AFFIRMED.

Significant and Substantial Contribution to the Cause and Effect of a Mine Safety Hazard

In Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, 825 (1981), the Commission defined the phrase significant and substantial violation as being one if, "based upon the particular facts surrounding [the] violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably

serious nature." In making this determination, the Commission noted that "the inspector's independent judgment is an important element in making significant and substantial findings, which should not be circumvented."

Here the facts show that there was a danger of a roof fall in the area where the powder magazine was located. As the inspector stated in his report, "there is enough evidence to believe that the intersection might fall." (Exh. G-2). If a roof fall had occurred over the magazine, the explosives could detonate causing fatal injury. Since the inspector found that over 10 persons could have been affected by such an explosion, this violation presented a hazard that was of an extremely serious nature. Leaving aside the inspector's opinion on this violation, I find that the fact of violation, together with the fact that men worked in this entry satisfies the Commission's requirements for a significant and substantial violation. Any explosion in a mine could result in an injury of a reasonably serious nature. Therefore, MSHA has established that the violation of section 75.1306 was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.

Unwarrantable Failure

A violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296 (1977). The evidence in this case, while not showing indifference on the part of the operator, does show knowledge of deteriorating roof conditions and a lack of reasonable care.

The inspector listed several factors which led to his issuance of an unwarrantable failure citation. The roof was cracked and broken and should have been observed by the operator. Additionally, the powder magazine was located near a roof fall and near an obvious violation of the roof control plan in that a crosscut was too wide. The inspector testified as to prior roof falls and the general bad condition of the roof. He stated that he was worried about the attitude of the operator and its employees. They were proud of the fact that no person had been injured due to rock falls. If the roof started breaking, they would then bolt it or timber it, but they would not take any preventative measures (Tr. 37-41). Jeffrey Bevins verified this practice of "wait and see" by the operator. He noted that there had considerable problems with roof falls, bad tops and fractures, and that "it fell in before we could do anything." (Tr. p. 111).

The operator's witness, Mr. Todd, testified that it was impossible to predict the fall of February 2, 1981, since the only indication of a bad condition was the water coming out of the top (Tr. p. 176). He stated that they had been studying the pattern of slips and trussbolting the roof

according to the pattern of roof falls. Since the area where the powder magazine was located was outside the predicted roof fall zones, they had not considered it to be dangerous (Tr. 209).

Having considered the testimony and evidence presented, it is apparent to me that the operator was aware of the bad roof conditions in the No. 6 entry. I have found that the powder magazine was not adequately protected and the resulting explosion could result in serious injury and I find that the violation of section 75.1306 was caused by the unwarrantable failure of the operator. Accordingly, the citation issued under section 104(d)(1) is valid.

Civil Penalty

Negligence

Although I have found that the violation of section 75.1306 was caused by the unwarrantable failure of the operator, I do not conclude that the operator was grossly negligent. The facts show that the operator had provided some protection for the powder magazine in that three timbers surrounded it. The operator contends that the roof around the magazine was not deteriorated and it was not necessary to put up crossbars or additional timbers. While I do not agree with this latter contention by the operator, I find that the failure to exercise reasonable care with regard to the powder magazine constitutes ordinary negligence.

Gravity

The finding that this was a "significant and substantial violation" warrants the conclusion that this was a serious violation. As Mr. Parks noted in his report, even if the roof fall itself did not cause an explosion, the aftermath of the roof fall or subsequent recovery of the magazine might cause the powders to detonate. (Exh. G-2). Accordingly, this violation was serious.

Good Faith Compliance

The inspector stated in his report the violation was abated within the time specified and he considered this to be normal compliance. At the hearing, however, Mr. Parks testified that mine management corrected the condition as quickly as possible once the violation was brought to their attention. This indicates rapid compliance and I have considered this in assessing the penalty for this violation.

Size of Business and Effect of the Penalty on Respondent's Ability to Continue in Business

The parties have stipulated that Peabody Coal is a large operator and that the penalty which I impose will not affect its ability to remain in business. I have adopted this stipulation in making my assessment of a civil penalty.

History of Prior Violations

The assessed violation history report filed in this proceeding indicates a rather extensive history of violations in the 2 years preceding the issuance of the citation in question. Particularly, I have given considerable weight to the fact that the company was cited for five roof control violations in the No. 7 unit during a 4-month period ending with the February 1, 1981, roof fall. This history of roof falls is reflected in the civil penalty assessment.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty in the amount of \$1,000 is reasonable and appropriate for Citation No. 1032760, and respondent is ORDERED to pay the penalty within thirty (30) days of the date of this decision.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 27 1981

CARROLL D. TENNEY, : Complaint of Discrimination
Complainant :
v. : Docket No. WEVA 80-279-D
: Federal No. 2 Mine
EASTERN ASSOCIATED COAL CORPORATION, :
Respondent :

DECISION

Appearances: J. Montgomery Brown, Esq., Attorney at Law,
Fairmont, West Virginia for Complainant,
R. Henry Moore, Esq., and Sally S. Rock, Esq.,
Pittsburgh, Pennsylvania, for Respondent.

This proceeding arises under section 105(c) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Morgantown, West Virginia, on August 25, 26, 27, 1981, and September 9, 10, 1981, at which both parties were represented by counsel. On September 10, after consideration of evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, a decision was entered on the record without benefit of transcript. This bench decision appears below as it appears in the transcript aside from minor corrections:

PROCEDURAL BACKGROUND AND STATEMENT OF THE CASE

This proceeding was initiated by the filing of a complaint in letter form by Mr. Carroll D. Tenney on April 9, 1980. Mr. Tenney had previously filed a complaint of discrimination with the Mine Safety and Health Administration. By letter dated February 5, 1980 (Exh. R-9), MSHA advised Mr. Tenney that after an investigation it had been determined that a violation of section 105(c) had not occurred. Under the Federal Mine Safety and Health Act of 1977, a complaining miner has an independent right to bring a complaint and this proceeding is based on that right. The Complainant contends that he was discharged because of his activities as a safety committeeman for approximately 3-1/2 years during the period 1974-1977 and for otherwise insisting on rigid safety practices during his tenure as an employee of the Respondent. The Complainant alleges that there were several instances where he had either been disciplined or harrassed for his safety activity and that he was discharged by Respondent in retaliation therefor. He also alleges that his discharge, which resulted from his admitted refusal to obey an order on November 30, 1979, to walk down a haulageway to his work place, was a setup, that is, it resulted from a plan or a conspiracy set up by Respondent's management to effect his removal.

Respondent denies the various allegations made by Complainant, denies that Complainant's discharge was the result of a conspiracy, and contends that Complainant made no safety complaint on November 30, 1979. Respondent charges that Complainant did not refuse to walk down the haulageway for safety reasons, but that he based his refusal on his right under the Union contract to be given a ride to his work place. If this contention is valid, then Mr. Tenney's remedy would appear to be confined to the grievance and arbitration procedures provided in the labor agreement.

Respondent also contended that Mr. Tenney's evidence should be limited to allegations of discrimination within the period of the statute of limitations and that the Complainant should not be permitted to attempt to prove a course of discriminatory conduct going back some 10 years. The Respondent's motion in limine to so limit Complainant's evidence was denied by me by order dated May 20, 1981, in which I held that such evidence of prior incidents might be relevant to establish discriminatory motivation. This ruling, I must note at the outset, may be contrary to the decision of the Mine Safety and Health Review Commission in Local Union 1957, UMW v. Southern Ohio Coal Company, 2 FMSHRC 3472 (December 9, 1980), which held by clear implication, although not expressly stated, that discriminatory motivation is not an essential element of proof for a complainant in a discrimination proceeding, even under the 1969 Act.

The primary and decisive issue is whether the Complainant on November 30, 1979, at the time he refused to obey an order from his foreman, Augustine Nunez, to walk a haulageway to his work place, was engaged in a protected activity. A subsidiary question is whether Complainant raised the issue of safety at this time, or more generally, whether any safety complaint or description of unsafe conditions was raised by Complainant. Other questions which were litigated in this proceeding were whether or not the haulageway in question was safe, whether or not Mr. Tenney was a satisfactory employee, whether or not there was evidence of a pattern of harrassment on the part of the Respondent directed against Mr. Tenney because of his activities as a safety committeeman or otherwise because of his safety practices, and whether or not Respondent treated Mr. Tenney differently from other employees similarly situated in connection with his discharge as well as other incidents which Mr. Tenney has complained of during the period 1974 through 1979.

To establish a prima facie case of discrimination under section 105(c) of the Act a complainant must establish by a preponderance of the evidence (1) that he engaged in a protective activity and (2) that the adverse action was motivated in part by the protected activity. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980). Complainant must establish these elements by a preponderance of the evidence, Secretary of Labor v. Richardson, 3 FMSHRC 8 (January 19, 1981).

At the outset of the hearing the parties stipulated that Complainant worked at Respondent's Federal No. 2 Mine until he was discharged on November 30, 1979. The parties subsequently stipulated that his employment

commenced in 1969, and I would footnote that it appears that Mr. Tenney actually was discharged on December 3, 1979, based on incidents which occurred on November 30, 1979. The parties also stipulated that this federal agency has jurisdiction over the parties to and the subject matter involved in this proceeding and, with respect to Complainant, that he had not been employed by Respondent since November 30, 1979, that on November 30, 1979, Complainant was working on the day shift, and that Complainant served on the mine safety committee from January 13, 1974, through April 13, 1977. In addition, the parties stipulated that Respondent has a payroll of 650 employees, that employees of Respondent other than Mr. Tenney have in the past received disciplinary slips for failure to clock in and for unsatisfactory performance of duties, and finally, that the distance that Mr. Tenney was ordered to walk on November 30, 1979, was 2,500 feet and that the distance Mr. Tenney had been ordered to walk in another incident on February 17, 1977, was 6,700 feet.

The general parameters of the factual material relevant in this proceeding were covered from Complainant's standpoint, by Mr. Tenney's initial pleading herein, and by his testimony.

ANALYSIS OF THE EVIDENCE AND PRELIMINARY FINDINGS

Mr. Tenney is presently 37 years of age and he has a high school education. He is married and has three children and he has worked only 2 weeks since November 30, 1979. He has been employed as a general inside laborer and (he thereafter) progressed to the top paying job at the mine, roof-bolt machine operator. His total mining experience has been over a period of approximately 12 years. Mr. Tenney was originally employed at the Federal No. 2 Mine of Respondent from August 1968, to March of 1969, at which time he was discharged for illegal picket line activity. Subsequently, he was rehired by Respondent at its Federal No. 1 Mine where he worked for approximately 8 months at which time he returned to the Federal No. 2 Mine where he worked as a general laborer for several months and then became a roof bolter.

With respect to the incidents of November 30, 1979, Mr. Tenney testified that at this time he was a roof bolter on the day shift and he arrived at work at 7:30 a.m. At approximately 10 minutes to 8, the cage (elevator) took him to a waiting room in the A-section where his roof-bolter helper, Jimmy Moore, and his foreman, Augustine Nunez, were waiting. Approximately four blocks from the waiting room is an 80-foot block area with steel doors on one side called the "transportation foreman's shanty." This shanty is shown as "X" on Exhibit R-2, a map of the mine. Mr. Tenney had not previously worked with Nunez as his foreman, other than the day before, November 29, 1979. An area called "old eleven switch," located about 2,500 feet down the haulageway in question from the "shanty", was the projected work place for Tenney and Moore, it being the same place they had worked the day before. On November 29, Tenney, Moore and Nunez had been transported from the shanty to the old eleven switch by a supply jeep driven by one John Long. According to Mr. Tenney, on November 30, the transportation foreman, Ed Jones, told Nunez that the jeep would be "down" an hour to an hour and a half. Nunez then told Moore and Tenney that no transportation was available and said

"We'll have to walk." Tenney said, "I told Nunez we would not walk up there." Tenney said, "I told Nunez under the contract we were entitled to a safe ride up there." I footnote at this juncture that Respondent's witnesses deny that Mr. Tenney used the phrase "safe ride" and allege that he only used the word "ride." Based upon subsequent holdings herein, I find this to be a distinction without a difference insofar as the resolution of the ultimate issues are concerned.

Mr. Tenney (testified) that the top in the area was low, that it had fallen in several times, that it had to be repaired constantly, and that the track had curves and bends in it. Mr. Tenney said he knew of the conditions along the haulageway as a result of his having been on the safety committee and that after his tenure as committeeman he had heard rumors that there had been falls. Mr. Tenney indicated that he kept close watch on the bulletin board after he was removed from the safety committee to see what kind of violations were being written and where. This accounts for his awareness of conditions in the mine and presumably along the haulageway. Mr. Tenney also testified that in May 1979, he injured his neck and had 3 days of therapy at a hospital in October 1979. Because of a low top along the haulageway, he did not want to bend over and reinjure his neck. Other complaints expressed by Mr. Tenney concerning the haulageway during this proceeding were that the crosscuts along the haulageway which were designated as "man-holes" contained cribs and posts which would cause a "hassle" for a miner walking along the haulageway to get into and out of the way of any incoming or outgoing motor or other vehicle traveling along the haulageway. Mr. Tenney mentioned that there had been incidents where portal buses had run into each other in this area and that on one occasion after a portal bus had run into a wire Respondent had cut down the height of the portal buses.

With respect to the conversation he had with Foreman Nunez, Mr. Tenney indicated that both Moore and he told Nunez that they would not walk the haulageway and that Nunez then called outside and other work was obtained in another area where cribs had fallen down creating an emergency. This development which is critical will be discussed at greater length subsequently.

Mr. Tenney indicated that from 8:10 a.m. to 10:30 a.m. he and Moore performed the emergency work, sometimes referred to in the record as "crib work," and that approximately 15 minutes into this work he and Moore saw the supply jeep which was reported to be broken down.

Thereafter, at approximately 10:30 a.m., Moore and Tenney returned to the shanty which was occupied by Nunez, Dale Gallagher, the general assistant mine foreman, foreman Gene Lamb, and foreman Frank A. "Rock" Hudson. According to Tenney, Nunez came out of the office and said, "You're going to have to walk." Nunez said that the jeep was at One West. Tenney asked how long it would be before the jeep would return. At this point, Gallagher came outside and said, "It would make no difference, you'll have to walk." According to Tenney, he said to Gallagher "I want a safe ride to my working section," and Gallagher said, "If you're not going to walk get your bucket and let's

go." Being told to "get your bucket" in terms of the parlance or jargon prevalent in the Federal No. 2 Mine means that a miner is being subjected to some form of disciplinary action.

Significantly, Mr. Tenney admitted that on the way out of the mine Mr. Gallagher said to him, "Take my advice and walk," to which Mr. Tenney replied that he would not walk.

When Gallagher and Tenney arrived at the office of the general mine foreman, Clifford Dennison, according to Tenney, while he was waiting for Dennison, he told Gallagher that he wanted a mine committeeman to go in with him. The events which occurred in Mr. Dennison's office are the subject of some dispute and findings will be made subsequently with respect thereto. Suffice it to say at this point that Mr. Tenney indicated that he complained in terms of safety to Mr. Dennison, which is denied by Mr. Dennison and by the assistant mine foreman, Mr. Gallagher. At this time, Dennison filled out a disciplinary slip entitled "Notice of Improper Action" (Exh. C-10 a) which appears to originally have been completed showing, "disobeying order," and changed to "disobeying safe and reasonable order," with the word "order" as originally used, being stricken. Complainant contends that this shows that the subject of safety was brought up in Mr. Dennison's office which is why the change was made.

Mr. Tenney went on to describe various incidents which occurred during his employment, commencing with his discharge for illegal picketing on March 28, 1969, and his receiving a discipline slip for unsatisfactory work on November 28, 1969, which, because of its remoteness, I find is irrelevant to the issues involved in this proceeding either to show a pattern of harrassment, discriminatory motivation or the quality of employee Complainant was at anytime material herein.

In one incident which occurred on May 8, 1974, Mr. Tenney was observed engaging in an unsafe practice when he walked under a boom and he was given a disciplinary slip. Mr. Tenney admitted committing this infraction and filed no grievance or complaint as a result thereof. Mr. Tenney also admitted that it might be an unsafe act and, in vague terms, indicated that no grievance was taken in order not to influence others into engaging in the same practice, or words to this effect. In connection with this May 8, 1974, incident, Mr. Tenney was observed by Mr. George Tippner, an assistant mine foreman, who testified that at the time he mentioned to Tenney that it was a violation of company policy and federal law to walk under an unblocked piece of equipment. Mr. Tippner indicated that this was a flagrant violation and that since Tenney was on the safety committee at the time it set a bad example.

Mr. Tenney also testified concerning his receiving a disciplinary slip on September 20, 1975, for failing to clock out. He admitted that he forgot to punch out and that he filed no grievance with respect to this incident.

Mr. Tenney also described an incident which occurred on October 23, 1975, when he was running a transfer feeder under the supervision of foreman Rock Hudson. According to Mr. Tenney, the belt would not run because coal and dust had pushed the belt off of the rollers. Mr. Tenney turned the power off after which Hudson came down to the belt and asked what was going on. According to Mr. Tenney, Hudson told him not to shut the belt down again and if he did it again he, Hudson, would "kick his ass." Mr. Tenney filed no grievance or complaint with respect to this incident, although he did apparently discuss the matter with his safety committee chairman. Mr. Tenney received no disciplinary slip as a result of this episode. Mr. Hudson, in his testimony, denied that he reprimanded Mr. Tenney on this occasion and I find, after considering the testimony of Mr. Tenney and Mr. Hudson, that no reprimand was in fact given, that any harsh language, if such was used by Mr. Hudson, was not disciplinary in nature, and that Mr. Hudson's concern about the belt being shut down was justified.

I find that this incident, as well as all those previously discussed in 1969, 1974, and 1975, involved no harrassment on the part of the Respondent directed toward Mr. Tenney. Nor is there, in any of the conversations which occurred during these episodes, evidence of discriminatory motivation or an anti-safety frame of mind on the part of the Respondent. Indeed, most if not all of these infractions were admitted by Mr. Tenney.

Proceeding now to subsequent episodes related by Mr. Tenney, on January 28, 1977, while he was still on the safety committee, Mr. Tenney testified he received two slips, one for not punching in, one for not punching out. Mr. Tenney claims with respect to this incident that he did not know they were in his personnel folder until he was discharged and it came up at his hearing. I find no evidence of harrassment, discriminatory motivation or animus towards Mr. Tenney generally contained in this episode based on the evidence presented, nor do I find that it played a part in Mr. Tenney's being discharged in view of the testimony of John Hetrick, the mine superintendent, who indicated that he gave no weight to it at the Step 2 stage of the grievance procedure. More specifically, I find that Hetrick's decision to effectuate the discharge of Tenney at this stage of the grievance procedure was based on the fact that Mr. Tenney in a similar situation on February 18, 1977, had refused to obey an order to walk to his work place and was disciplined. This episode will likewise be discussed in more detail subsequently.

Mr. Tenney contends that part of the Respondent's pattern of discrimination directed towards him for his engagement in safety activities was the fact that he was removed from the safety committee in February 1977. As a mine safety committeeman, Respondent's evidence shows, Mr. Tenney had more power than other miners in the mine including the power to close the mine in the event of an imminent danger. On December 29, 1976, Mr. Tenney exercised this power when he handed the general mine foreman a report stating that an imminent danger existed on Section Six Left. The details of this incident are best described in Exhibit R-10 which is the Arbitrator's Decision dated April 13, 1977, upholding Mr. Tenney's removal from the safety committee at

the request of Respondent for the reason that Mr. Tenney's action in closing down the section was arbitrary and capricious. The burden of proof on the Respondent in the Arbitration Proceeding to effectuate the removal of Tenney as safety committeeman was to show that his actions were arbitrary and capricious. At Page 15 of Exhibit R-10, Arbitrator Jay Scott Thorpe stated that Tenney was confronted with three alternatives under the contract in seeking a cure to the problem involved:

First, he could proceed as he did, by declaring an imminent danger, and facing the possible consequences of being removed from the safety committee. Secondly, he could file a safety grievance, and let an arbitrator decide the matter if the company failed to lay the necessary track. If such a grievance had been filed in the past, the matter might have been long since resolved. Thirdly, Tenney, or any of the other employees in the section (particularly those who testified that an imminent danger existed), if they had reasonable grounds to believe that they were required to work under conditions abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice could be abated, had the right to notify their supervisor of such a belief under Article III, Section (i)(1), and if the situation was not corrected, could be relieved from duty. None of the persons on the section, including Tenney, availed himself of this remedy.

The Arbitrator went on to indicate that the declaration of an imminent danger must not be based on mere whim or will of a safety committeeman and found that, "Tenney's action was without fair, solid and substantial cause and was not based upon the rules fixed by the contract and therefore must be considered arbitrary and capricious."

Mr. Tenney testified in the instant proceeding that he was thinking of taking action against the Respondent for having him removed from the safety committee but that he was fired before it went through. Mr. Tenney indicated that after he was removed from the safety committee, shortly thereafter he was taken off of roof bolting by Respondent and thereafter he worked approximately 90 percent of the time shoveling. Other duties he performed were picking up papers on the section, driving a truck, and similiar chores.

On February 18, 1977, Mr. Tenney was given a disciplinary slip for refusing to walk to his work place (see Exhs. R-6 a, b, and c). This incident, together with the episode involving his removal from the safety committee, constitute the very critical incidents out of the numerous episodes which Mr. Tenney has listed--from the standpoint of the issues involved in this proceeding. The disciplinary slip indicated Mr. Tenney was to be suspended for 5 days with intent to discharge. Respondent has clearly established that insubordination or a miner's refusal to obey any direct

order is a dischargeable offense and not subject to what is called the Respondent's "progressive disciplinary plan" which for minor infractions requires preliminary warnings and a progressive upgrading of discipline before a miner can be discharged.

Mr. Tenney's punishment for refusal to walk on February 18, 1977, became the subject of a grievance filed by Mr. Tenney on March 7, 1977. The Arbitrator's Opinion and Award (Exh. R-13) sets forth the salient details of this episode and Pages 2 through 5 thereof are incorporated herein by reference. See Attachment "A".

I find that in the respects material to this proceeding the incident of February 18, 1977, is similar to the circumstances involving Mr. Tenney's refusal to walk in this proceeding. The critical provisions of the National Bituminous Coal Wage Agreement of 1978 (Court Exh. 1) was involved in both episodes. Article III, section (o)8 of this contract provides: "The employer shall provide a safe man trip for every miner as transportation in and out of the mines, to and from the working section." Harold G. Wren, the Arbitrator, reached the following conclusions:

For several reasons, the Union's argument that the Company is required at all times to provide transportation for miners to their work stations must be rejected. In the first place the clause in the contract is found in Article III, dealing with matters of "Health and Safety." Its purpose is to insure the safety of every employee; it does not purport to confer an additional benefit on the employee. To the extent that an employee can proceed to and from his work station safely during the course of his working hours, the company is not required to provide vehicular transportation. There may be situations where considerations of health and of safety would require that the company provide some form of motor transportation. But in the case before us, Grievant was capable of walking to his work station without jeopardizing the health or safety of himself or other employees."

Secondly, the clause is concerned with transits "in and out of the mines" and "to and from the working section." These phrases refer to those activities occurring at the beginning and end of every shift.

* * * * *

Thirdly, to construe section (o)(8) in the manner that the Union suggests would place an unrealistic burden on the Company's facilities for its day-to-day operations. While management may be expected to utilize the various types of motor transport within the mine to aid employees as much as possible, normal considerations of efficient operation require

that the transportation facilities be used primarily to meet the needs of production. Transportation of personnel within the mine during the course of a particular shift must necessarily take a second priority to the Company's operational requirements. It was not unreasonable for the company to ask Grievant to walk to his work station, a distance of 6,700 feet, or approximately 1.27 miles. Grievant knew the area well.

The Arbitrator went on to find Mr. Tenney "technically guilty of insubordination" and concluded that a punishment of 4 days (Respondent after investigation had reduced the initial 5-day suspension, Exh. R-6) was too severe for such an infraction.

Finally, with respect to the listing of incidents relied on by Mr. Tenney to show either harrassment, discriminatory motivation, or disparate treatment, three final episodes of exceedingly minor importance will be mentioned.

Mr. Tenney testified that sometime in the winter of 1978 Bill Lemley, who is believed to be either mine foreman or assistant mine foreman at the time, caused an unsatisfactory work slip to be given to Mr. Tenney. A grievance was filed, according to Mr. Tenney, but management removed the slip at the conference stage of the procedure.

Again, in August 1979, Mr. Tenney recalls an incident where he observed an unsafe practice and caused it to cease. In his testimony and in his initial complaint herein, this incident is described. According to Mr. Tenney, he was working on One West Transfer. The transfer was about 10 blocks from the section. On this day, the supply crew was putting supplies on the section. At quitting time, Mr. Tenney went to the track where they had left him off that same morning. In his complaint, Mr. Tenney goes on:

I waited for the bus to catch a ride back. The supply crew was coming out, and I saw cap lights all over the two motors. The men, including Jack Shear the foreman, were riding on the motors, on the bumpers and in the deck with the motormen. This is against state and federal law. When they got to me they said, 'get on,' I said no, I would not ride the motor out because it was dangerous to ride out like that. The boss said to bring the bus up, and we rode out on the bus.

Again, in his testimony and in his initial complaint a final incident was described by Mr. Tenney as follows:

On September 18th, 1979 they switched me from day shift to afternoons. I told them that, according to the contract, they should not put me on afternoons, because they had general laborers bolting on the day shift, and I was a classified bolter. I told the superintendent that they had made a mistake, and that they needed to switch me back to day shift.

After telling them that I was going to file a grievance, they told me that they would check with Joe Luketic and find out if they had made a mistake. Evidently they checked, found they had made a mistake and placed me back on day shift. I feel this was another form of harrassment."

I find these last two incidents more as evidence that the Respondent did not interfere with or attempt to stop Mr. Tenney's ultra-safe approach to safety, and the last event was one where the Respondent apparently acquiesced to another one of Mr. Tenney's demands without any evidence of rancor or other reaction indicating anger or a retaliatory frame of mine.

Mr. Tenney in his testimony and in his initial pleading described a final episode which occurred on the same day as the last incident described, September 18, 1979. According to Mr. Tenney,

There was another incident where I refused to work in an unsafe condition. A crew of men were sent to pick up all the trash in a given section. A foreman told me to pick up trash on the wire side. I said the wall was not guarded, and I wouldn't work under it. So, I worked on the clearance side while three or four men worked under the wire.

This incident, as well as the preceding three incidents, show not the pattern of harrassment as contended by Mr. Tenney, or continuing animus on the part of Respondent, but rather they show a pattern of the Respondent's foremen acquiescing to Mr. Tenney's demands, one of which was a contract demand. This completes the listing of numerous episodes raised by Complainant some of which will be discussed subsequently herein insofar as they relate to other issues. It is found that these incidents, whether considered individually or cumulatively, do not establish a pattern of harrassment by Respondent.

Returning now to the critical incident on November 30, 1979, which resulted in Mr. Tenney's discharge, his claim that a conspiracy existed primarily must rest on the testimony of then transportation foreman, Edward Jones. Mr. Jones testified that on November 30 he arrived at the mine at 6 a.m., at the shanty at 6:45 a.m., and that he received a call from Clifford Dennison, the general mine foreman. In his testimony, Mr. Jones was inconsistent as to the exact time this phone call took place, but indicated that Dennison told him "not to give Tenney transportation back to the job," or words to that effect. According to Jones, Dennison gave no reason. Jones said, "I knew the reason, it was because Tenney was on the safety committee." Jones said that, "we've been holding it against Tenney since he was on the safety committee." Jones then told Tenney that no transportation was available.

Mr. Jones then testified that Tenney and Moore went down to repair the cribs and that when they came back he told Jimmy Moore, "you'd better get away from here, because Tenney is going to get fired." I footnote that

Jimmy Moore did not confirm this latter testimony. Mr. Jones said that later in the day he heard Mr. Gallagher and Mr. Dennison talking in the shanty and they said something to the effect, "Well we finally got him." Mr. Jones said that they talked and joked about it.

Jones indicated that he had filed a "law suit" with the Equal Employment Opportunity Commission against Respondent for race discrimination (he is a Negro), harrassment on the job, and age discrimination (he is 56 years old). This EEOC proceeding was filed sometime from July-September 1978, or more than a year before the Tenney discharge. The EEOC proceeding is still pending. Mr. Jones was transportation foreman from November 1979, until July 25, 1981.

The roof-bolter helper for Mr. Tenney on November 30, James E. (Jimmy) Moore, likewise is an important Complainant's witness. On November 30, according to Mr. Moore, after Nunez ordered him and Tenney the first time (at approximately 8:15 a.m.) to walk up the haulageway to their work place, Tenney said he was not going to walk and that it was unsafe to walk up there. Moore said that Nunez got on the phone and talked to Gallagher at this point and that subsequently he and Tenney walked to the emergency crib job which was 500 to 600 feet away. Mr. Moore said that in terms of custom and practice in the mine it was customary for miners to go to the transportation shanty where they would get a ride to go to work, it was common to wait for a ride and, if it was going to take a while the miners would be assigned to pick up papers, etc. Mr. Moore said that he thought Tenney and he got these "work while waiting" assignments more than other miners.

On cross-examination, Mr. Moore confirmed that he refused to walk the first time, meaning that on November 30, as the record shows, there were two occasions when he and Tenney were asked to walk down the haulageway to their work assignment--at 8:15 a.m., approximately and 10:30 a.m., approximately. Mr. Moore admitted that he might have said, "I won't walk up there because there won't be anything for me to do without Carroll." Mr. Moore also said that he saw the jeep go by shortly after they had gone to work on the emergency crib job and on cross-examination, when told that Mr. Tenney was uncertain whether he had explained to Foreman Nunez why he thought walking down the haulageway was unsafe, said: I think he did tell him." (Emphasis added.) Mr. Moore was unable to recall the specific names of other miners who did not pick up papers while waiting for transportation at the shanty. Mr. Moore said that he was not aware that the transportation foreman had standing orders to assign work to miners waiting for transportation.

With respect to the 10:30 a.m. conversation with Nunez--after Tenney and he had returned to the shanty--Mr. Moore indicated that after Nunez said they would have to walk, Mr. Tenney said he would not walk because (1) what the contract provided, and (2) that it was unsafe. Mr. Moore said that he told Mr. Gallagher that he would walk at some point during this conversation, his reason being that he had "seen a man fired." Mr. Moore said that he shoveled that day. Finally, he characterized Mr. Tenney as a safe worker and not "necessarily" a slow worker.

The testimony of Mr. Tenney, Mr. Moore, and Mr. Jones having been analyzed with respect to the November 30th incident, it is appropriate to consider the Respondent's position with respect to this incident focusing now on the issues raised by Mr. Tenney of ultimate importance: Whether or not Mr. Tenney engaged in a protected activity by raising a safety matter at that time and whether or not Respondent or any of its management personnel conspired to discharge Mr. Tenney.

Mr. Nunez testified that he was Mr. Tenney's supervisor on November 29 and November 30, 1979, and that these were the only 2 days he had ever been Mr. Tenney's superior. Mr. Nunez said that when they arrived at the shanty at approximately 8 a.m. Ed Jones, the transportation foreman, advised him that the supply jeep was broken down and it would take 1 to 1-1/2 hours to repair. Nunez said that he had no reason to question this. Nunez told Moore and Tenney that the jeep was down and they would have to walk and Mr. Tenney said that he did not "give a darn" if it was down 4 or 5 hours he was not walking. The precise quote of Mr. Tenney at this time appears in Exhibit R-7 at Page 2. Mr. Tenney denied making this statement and for reasons which subsequently will be given in resolving credibility in this case, I credit the version of Mr. Nunez and the version found by Arbitrator Martin Lubow in his Opinion and Award dated December 14, 1979, at Page 2 of said exhibit. Nunez then asked Jones to let him use the phone, which he did. Nunez called Dennison and told him he had a problem. Dennison said, "Here, talk to your shift foreman," and turned the phone over to Gallagher. Nunez told Gallagher what had happened and Gallagher told Nunez to go through the standard procedure which included emphasizing to Mr. Tenney that he, Nunez, was giving him a direct order. Gallagher at the time was on the surface and while they were speaking on the telephone between the mine and the surface, Gallagher was informed of a sagging support which had developed near the location of Nunez and his men. Gallagher instructed Nunez to proceed to work on the emergency crib job. Because this work arose, Nunez, at the 8 to 8:15 a.m. refusal episode, did not go through the procedure of telling Mr. Tenney that he was giving him a direct order at that time. Nunez testified that neither Moore nor Tenney complained to him while they were working on the cribs about the Jeep going by.

Upon returning to the shanty after the crib work was completed Nunez asked Jones if the Jeep was available and Jones replied that it was not. Nunez told Tenney and Moore the Jeep was not available and that they would have to walk. Tenney told Nunez, "I understand your order; I'm not walking because the contract says I don't have to, the contract says I'd be supplied with a ride and I want a ride." (See Exh. R-7, Page 2.) At the hearing, Nunez said that Tenney said, "I understand what you're saying and I want you to understand what I'm saying." At this point, Gallagher came out and asked Mr. Tenney why he would not walk, to which Tenney replied, the contract provides a ride to the work place. Gallagher told Tenney to take some good advise and walk. Gallagher told Tenney he would have to take him outside and give him disciplinary action. Tenney said, this has been tried before and they did not get away with it, and "You're not going to get away with it." Gallagher said, "Well, we'll see."

Nunez indicated that at this point he was not aware that Tenney had been involved in the February 18, 1977, episode, where he had refused to walk. With respect to the amount of traffic going down the haulageway at the time of the two refusals, Mr. Nunez testified that at 8 a.m. the traffic would have been light and no trips would have been going through, and that at 10 to 10:15 a.m. possibly one trip would have been going through. Nunez, who has an artificial foot, gave the opinion that there was no hazard in walking up the haulageway, that it was relatively clear, and that the shelter holes (crosscuts) were accessible. Nunez said that he had walked from the shanty to "old eleven" many times and that other people have walked up there. On cross-examination, Nunez indicated that the others who have walked up there were fire bosses and shift inspectors, and they were not Union contract personnel as far as he knew. Nunez did not recall ever ordering any contract employee to walk up the haulageway.

According to Nunez, Mr. Tenney said he would not walk because the contract provided for a "ride" not a "safe ride." The duties Tenney and Moore were to perform on November 30 were to install additional bolts in the haulageway. Nunez did not recall that there had been a fall in the area in February of 1977.

With respect to whether or not Moore refused to walk, Nunez testified that at the 8 a.m. refusal episode Moore was asked if he would walk and Moore replied, "I can't operate the machine by myself." Nunez said that Moore at first said, "There's nothing for me to do", and that he replied, "I'll find something for you to do," and that Moore then said, "Well, I will walk because I get paid as much for walking as I do working." Then, Nunez said, he started talking to Mr. Tenney again and told him that they had to walk. Nunez testified that he did not tell Gallagher that both Tenney and Moore would not walk and that Gallagher asked Mr. Moore to walk prior to telling Mr. Tenney "to get his bucket." During his testimony, Nunez subsequently clarified the above testimony by indicating that it was at the 10:15 refusal that Mr. Moore said, "I'll walk, I get paid as much for walking as for working." And again, it was at the 8 a.m. refusal that Moore said there was nothing he could do by himself, to which Mr. Nunez responded that he would find something for Moore to do.

Mr. Gallagher testified that Nunez called him on November 30, 1979, and told him that Tenney and Moore did not want to walk up the haulageway to their work place. At this point, Ed Jones came on the phone and said that there was a bad crib that needed repairs immediately, and that he then told (Nunez) to take Tenney and Moore down to repair the crib. Gallagher said that Nunez did not advise (him) why Tenney would not walk up to the assigned work place. After Gallagher got off the phone with Nunez, he had a conversation with Cliff Dennison and all he said to Dennison was that Tenney would have to walk up the haulageway.

Gallagher was in the shanty when he overheard Tenney say he would not walk and Gallagher went out to take care of the situation at the time of the second refusal. Gallagher said he thought that Tenney was refusing a direct order from Nunez. Gallagher told Tenney, "Do you understand what he's saying to you?" Tenney replied, "Do you know what I'm saying?"

According to Gallagher, Tenney did not say it was unsafe to walk nor did he mention that he had a bad neck or mention low top or traffic along the haulageway. Gallagher said that he told Tenney two or three times, "If you don't walk up there I will have to suspend you," and that Tenney replied, "I have a contract right for a ride." Gallagher said he told Tenney, "Carroll take some good advice and walk up there and we'll forget the whole thing." Gallagher said, "I thought I could reason with him one more time and he might change his mind." Gallagher verified that at one point Tenney said that Anthony Harris had tried the same thing. Gallagher was not familiar with this episode.

Gallagher was present at the meeting in Dennison's office between Tenney and Dennison. According to Gallagher, Mr. Tenney at this time kept saying that the contract afforded him a right to a ride to his working place. Gallagher did not hear Tenney say that it was unsafe to walk up there or say anything about his neck injury or bad top. Gallagher said that miners and foremen walk up the main haulageway if no ride is available. He did not consider it unsafe. Gallagher also described the Respondent's standard procedure for handling a miner's failure to punch in or out.

Gallagher specifically testified that in the conversation in Mr. Dennison's office at the point when Dennison made the change on the disciplinary slip, he did not remember Mr. Tenney telling Dennison about safety. Gallagher verified that Tenney did say he was available for other work. Gallagher, as in the case of all witnesses, testified at length concerning the haulageway and other practices and the foregoing is not intended to be an exhaustive summary of his testimony.

With respect to whether or not Tenney made a safety complaint or raised a safety matter at an appropriate time on November 30, 1979, the Arbitrator found that, "Tenney never raised any basis for his refusal other than his contractual rights" (Page 3, Exh. R-7).

DISCUSSION, CREDIBILITY RESOLUTIONS, AND ULTIMATE FINDINGS AND CONCLUSIONS

There is no question but that Mr. Tenney was discharged for failing to obey a direct order to walk down the haulageway to his work site. The general question involved is whether Mr. Tenney engaged in a protected activity, that is, whether his refusal to walk to the work site was because the travelway was unsafe.

Did Mr. Tenney make a safety complaint or raise a safety issue on November 30, 1979? Mr. Gallagher, Mr. Nunez and Mr. Dennison all deny it. Although by the time this matter got to Dennison, I conclude that it was too late for any safety complaint to be made in any event: Tenney had been taken out of the mine at this point and was in the process of being disciplined, having been given repeated chances over a period of time to change his mind. This time period included the time involved in the conversation with Gallagher and with Nunez below ground, as well as the time spent going up in the cage to the surface and the time spent waiting for Mr. Dennison at his office before the conversation in Mr. Dennison's office occurred.

Highly persuasive evidence establishing that Mr. Tenney did not raise a safety matter on November 30, 1979, is reflected in the transcript of the Lubow Arbitration Proceeding (Exh. R-8). At the bottom of Page 27 of this transcript, Mr. Tenney gives this account of the 8 a.m. refusal after Nunez said they would have to work:

I asked him how long it would take to get the pole fixed and he said, "An hour and a half." I said, "Well, it's never taken an hour and a half before. It's an outrageous amount of time," and that I felt that I was afforded a ride under the contract, Article III, section (o), paragraph (8). He asked Jim Moore, at the same time, he said, "Are you walking Jim" and Jim told him, "No." [Emphasis added.]

Subsequently, on page 28 after describing interim events, Mr. Tenney made this statement:

After Mr. Shear went out of there, then Augie told me that we was going to have to walk, and I told him that we wasn't, and I never used no four-letter word, and I didn't tell him that I didn't care whether it took four to six hours. I just told him that I felt under the contract that I was afforded a ride into and out of the coal mine, to and from the working section. Before I could tell him anything else he got on the phone. So, there was other reasons why I wasn't walking, and they said that it's been brought out that it was unsafe or whatever. I thought it was unsafe, but they never even gave me a chance to tell them it was unsafe." [Emphasis added.]

Subsequently, in his testimony, again at Page 28, Mr. Tenney said:

In my mind, there was two reasons why I didn't do it, didn't walk. One was the contract, and that I felt it was unsafe because it was low top and that area back through there had been, I guess, I was under the assumption it was endangered off. I really didn't know. Plus the fact that it was low. [Emphasis added.]

Again in this transcript (Page 29), Mr. Tenney said:

We finished doing what we had to do there to tighten up those cribs. We tightened them up the best we could, and once we got that finished, we took the ladder back down to the steps where the jeep runner could come down and get it and take it to where it was going. It was going to some section. Then we went over to the dispatcher's shanty. When I looked at my watch, when I got down off the beams and cribs, it was ten thirty-five, and by the time we got back over to the transportation foreman, it was more like twenty

'till eleven. I went in and sat down there in the waiting room. Augie went in and talked to Mr. Jones, he's the transportation foreman. Mr. Gallagher, Mr. Hudson and I don't know who else was in there, I never heard all of the asking of where the jeep was at. I could hear a bunch of whispering going on, it wasn't normal talking, it was whispering. He turned around and came outside and said, he told me, "The jeep ain't available. We're going to have to walk." I told him, "Well, under the contract I still believe I am afforded the ride into and out of the coal mine, to and from the working section." I said, "I am still available to do other work. I am not wanting not to work. I will work." Then I was going to tell him about where I thought it was unsafe. In the next instant Mr. Gallagher came out behind him and said, I think his first words were, You are not walking?" or something to this effect. I really don't know because he said he didn't, he told me he didn't care where the jeep was at, he was giving me a direct order. I said, "Well, I still feel that I am afforded a ride into and out of the coal mine. I still feel that." He said, he asked me if I understood what I was doing and I guess I did, I thought I did, and I told him yes. He said, "I'm going to take you outside." He wasn't talking to Jim Moore. He never said one word to Jim Moore this second time, until after he said that he was going to take me out. Then he turned around and asked Jim, he said, "Are you walking." Jim told him, "Yes, I'll walk" after he told him that he was going to suspend me. Then he said, "Get your bucket" and I told him I didn't have no bucket, I don't carry one. Then he told me, "Come on let's go." I went with him. Going up on the cage I told him, I said, "Anthony Harris tried to fire me before for the same thing" I made the statement, "You tried to fire me before" and he said "No, I ain't never tried to fire you before. It wasn't me. I have't tried." I said, "Well, management tried it." We got outside, went to Mr. Dennison's office, and Mr. Dennison wasn't there at the time. We waited there a couple of minutes or whatever and Mr. Dennison was across the street to the superintendent's office or the main mine office and he came in a minute or two later. I don't know exactly how long it was. [Emphasis added.]

On Page 31 of this same transcript, is a recognition that this proceeding was not a safety matter. Commissioner Luketic made the following statement, "Mr. Arbitrator I am going to have to object to the Commissioner for the Mine Workers getting into Mr. Tenney's feelings about it being unsafe. This was never an issue at any of the prior steps, and to bring in safety at this point would be adding to the grievance." There were Union representatives in attendance at this meeting, as well as Mr. Tenney. No one made any exception to this recognition.

Both the grievance involving the February 18, 1977, grievance for Mr. Tenney's refusal to walk and the entire proceeding for the November 30, 1979, refusal to walk discharge, were treated by all involved parties as a "contract" matter and not a safety matter. In the Pasula decision, supra, the Commission in dicta expressed its approval of the use of arbitrators' findings: "We believe that according weight to the findings of Arbitrators may aid the Commission's Judges in finding facts. A Judge faced with a credibility problem may find the views of the Arbitrator on labor practices in the mine's customs or on the common law of the shop helpful." The sections of the transcript above quoted are not arbitrators' findings which I am adopting. This is a transcript of testimony which Mr. Tenney rendered in these proceedings and thus takes on a much higher degree of weight than even an arbitrator's conclusions and findings. This transcript showing Mr. Tenney's statements was of a proceeding conducted on December 7, 1979--within a very short period after the incident with which we are concerned transpired. I believe it is entitled, in and of itself, to controlling weight on the issue of whether or not Mr. Tenney was engaged in a protected activity on November 30, 1979, when he refused to obey repeatedly an order to walk down the haulageway from the shanty to Old Eleven. There are other reasons for my finding in this connection which will subsequently appear herein.

One of the principles of mine safety law is that "a miner who reasonably believes that conditions are unsafe is not required to accept a foreman's evaluation of danger." Phillips v. IBMA, 500 F.2d 772, 780 (D.C. Cir. 1974). A necessary corollary to this concept would seem to be that a mine foreman would have the right to discuss the safety problem with the miner--and evaluate it. To do that, it would be necessary, of course, for him to know what the safety hazard or safety complaint is. On the facts established in this proceeding, neither Foreman, Nunez nor Gallagher, had any cause to evaluate any dangerous condition or to discuss it with Mr. Tenney or to reason with Mr. Tenney with respect to the same. Because of Mr. Tenney's handling of his refusal to walk, discussion of safety or the nature of hazardous conditions was shut off. If Mr. Tenney had the time to make the statement that the company "had tried it before," and the like, he certainly would have had the time to have emphasized any safety complaint or complaints that he might have had as a basis for his refusal. During the considerable length of time that was involved with Nunez and Gallagher prior to the meeting in Dennison's office, it seems inconceivable that if he was so concerned with safety that that would not have been the immediate matter raised by him and emphasized by him at every stage of this episode as it developed from conversation to conversation. The absence of such discussion at any time compels the conclusion that Mr. Tenney was not engaged in a protected activity. Other evidence of this is the fact that the grievance proceeding filed in this proceeding was not treated as a safety matter. At no time during the conversations with Nunez or Gallagher, did Mr. Tenney treat his complaint as a safety matter.

I also find, because of the credibility resolution I make subsequently, that the accounts of Nunez and Gallagher with respect to the conversation in Dennison's office are to be credited and that Mr. Tenney did not raise a safety matter at that time either.

Mr. Tenney was well aware of his contract rights as a safety commiteeman. If this record establishes anything, it is that Mr. Tenney is not inclined to sit on such rights and in his own testimony Mr. Tenney has pointed out his awareness of the bulletin board, safety matters, and the like at all times, even after he was removed from the safety committee. This matter has not been treated as a safety matter by Mr. Tenney or any of the other parties, including the Union.

To fully understand the November 30, 1979, refusal to obey an order, the February 18, 1977, episode must be examined as well as a third "refusal" incident testified about by Respondent's section foreman, John Wujcik. Complainant admits that the grievance proceeding filed by him on the 1977 refusal to walk was not processed as a safety grievance under the contract. Mr. Wujcik testified that in 1979, when Mr. Tenney was a roof bolter on his section (No. 3 South) for 2 weeks, a portal bus broke down. Wujcik asked the crew to walk to the section. Mr. Tenney said that they were supposed to have transportation and that he would walk under protest. The significance of this testimony is simply that the contract right asserted by Mr. Tenney in refusing to walk on two prior occasions did not involve a safety matter. It indicates that this right to transportation has been a major cause of Mr. Tenney in the past.

I find that Mr. Tenney's refusal on November 30 was not made in good faith for the following reasons. The result reached in the arbitration of the February 18, 1977, refusal to walk was that the contract right to transportation applies only to the beginning and ending of a shift. While this ironically might have justified Mr. Tenney's refusal at 8 a.m. on November 30, 1979, it underscored that there was no such right to transportation otherwise. This was a proceeding which involved Mr. Tenney himself. Although Mr. Tenney denied that he had read the Arbitrator's Decision, he did admit that he had been told what it said. I therefore find that Mr. Tenney had knowledge of the content of that award, even assuming, arguendo, that his denial (that he did not read the award) is to be credited. I therefore find that Mr. Tenney's refusal on November 30 was made in full knowledge of the illegality of doing so and that, accordingly, it was not made in good faith within the meaning of the Commission's ruling in Secretary of Labor v. United Castle Coal Company, 3 MSHRC 803 (1981). I find that the Respondent has met the exceedingly difficult burden of proof placed on it by the United Castle decision in that it has established an absence of good faith in Mr. Tenney's work refusal--assuming the same should become relevant. The finding of an absence of good faith would be relevant only in the event that my finding that Mr. Tenney was not engaged in a protected activity on November 30, 1979, is overturned.

Taking up now Complainant's contention that he was a victim of a conspiracy by Respondent's management, it is well to recall initially that Edmund Jones, the transportation foreman on November 30, 1979, mentioned a telephone call that he received from Mr. Dennison telling him not to give Mr. Tenney transportation back to his job. Jones said that Dennison gave him no reason, but that he, Jones, knew the reason. Another witness for

Complainant, Ira Varner, a motorman at the No. 2 Mine testified, inter alia, that he had heard Mr. Jones say something to the effect that Mr. Tenney had been set up. Respondent's witnesses, Gallagher, Nunez and Dennison have denied this allegation. In final argument, Complainant's counsel has taken the position that Nunez and Gallagher were not involved and that the conspiracy would have been between Dennison and Jones. Thus, to find any basis for the conclusion that Mr. Tenney was set up would necessarily require the crediting of Mr. Jones' testimony. To find a conspiracy in this connection, so also would Mr. Tenney's testimony to some extent have to be credited.

Mr. Jones' testimony is suspect for several reasons. The first is that as a member of Respondent's management he, patently, is a renegade. In and of itself this means nothing, but the fact stands out that he is attempting to blow the whistle against others in management in this case. Secondly, his testimony with respect to the instruction he received from Dennison contains an uncertainty. Assuming, arguendo, that Dennison did tell Jones that he was not to give Tenney transportation, Jones acknowledges that Dennison gave him no reason for this order. Jones says, "I knew the reason," meaning that he was reading into what Mr. Dennison said Mr. Dennison's motivation. A third reason why I do not credit Mr. Jones' testimony in this respect, is the confusion that he had with respect to the time of this conversation. Furthermore, his testimony that he told James Moore that he had better get away because Tenney was going to be fired was not confirmed by Moore.

In determining whether Mr. Jones' testimony should be credited or Mr. Dennison's denial should be credited, the demeanor of the witnesses plays an important part of the resolution in this case. Although in many cases a witness' demeanor and what is physically displayed by a witness while testifying is not a bellwether of the trustworthiness of the witness, I find in this case that it is. Mr. Jones conveyed a sense of being in touch with a different reality than all other witnesses in this proceeding including Mr. Tenney. There are two sides in this proceeding and naturally there are wide divergences in testimony between the witnesses on one side and the other. Mr. Jones' testimony struck me as totally out of line with the testimony of the other witnesses in the way that it was delivered, in its quality, and with the sense of sincerity in which it was presented. This was not entirely traceable to the fact that he smiled throughout his testimony which, I believe, is simply his personality.

Finally, a powerful reason for the reduction of the weight in reliability to be accorded to his testimony is the fact that he is engaged in a discrimination suit which is still pending against the Respondent in this proceeding. The type and nature of this litigation like the present litigation is one which stirs high emotions. I therefore credit Mr. Dennison's denial of this alleged conversation and find that in all the circumstances and for the reasons stated, Mr. Jones' testimony is not trustworthy.

With respect to the weight to be accorded to the testimony of Mr. Tenney, it is noted that Mr. Tenney's account of the conversations with Foremen Nunez and Gallagher were not sufficiently detailed to be persuasive. His testimony

at times with respect to whether he raised a safety complaint or not seemed calculated to avoid a direct answer. His testimony in contexts other than the conspiracy contention are also found to not inspire a high degree of confidence. For example, on cross-examination, he did not satisfactorily explain his failure in the Lubow proceeding to mention that a complaint of unsafe conditions along the haulageway in the November 30 episode had been made. In at least one point in that part of the transcript, which I have included previously in this decision, I find that Mr. Tenney was evasive on this point.

Again, Mr. Tenney claimed that he had no time to make a safety complaint on November 30, 1979, a crucial point in this proceeding. Yet, he talked for a considerable time to Foreman Nunez and Dale Gallagher according to his own testimony. This explanation, that he lacked the time to complain about safety conditions, does not ring true and is directly contrary to facts overwhelmingly established in this record.

Again, in resolving credibility I must consider the February 18, 1977, incident. Although this matter was pursued to final arbitration and involved a matter obviously important to Mr. Tenney, Mr. Tenney testified that he had never read the Arbitrator's Decision. This conflicts with his emphasis that he has an intense interest in safety matters and his denial that he did not read this decision is shockingly at odds with every other sense of the man which is shown in this record.

Again, Mr. Tenney's statement that he was thinking of taking action over his removal as a member of the safety committee but was discharged before he got around to doing so, is not the kind of explanation which lends itself to the trustworthiness of other testimony. 1/ It is similar in type to the other somewhat incredible explanations mentioned above, all of which are on critical points. Therefore, I am constrained to accept the accounts and versions of the conversations and incidents described by Dennison, Gallagher, Nunez and other of Respondent's witnesses over that of Mr. Tenney in the several places where there is disagreement between them previously set forth above.

Mr. Moore's testimony is obviously calculated to help Mr. Tenney. This was carried to the extent that in at least one instance his testimony conflicted with Mr. Tenney's. Thus, Mr. Moore testified that at the 8 a.m. refusal on November 30, Mr. Tenney raised the subject of safety. Even Mr. Tenney does not claim that he did so at that time and Moore's testimony in this respect conflicts with all the other evidence in this record.

Based upon the foregoing credibility findings and for the reasons previously detailed above, I conclude that the Respondent did not plan, plot, or conspire to set Mr. Tenney up for discharge on November 30, 1979. Other factors are also totally inconsistent with this contention of Complainant.

1/ In view of the time interval between the two events.

Thus, I note that on that morning Mr. Gallagher told Nunez to assign Mr. Tenney to an emergency situation which arose simultaneously with Mr. Nunez's report to him that Mr. Tenney had refused to walk. Mr. Gallagher attempted to talk Mr. Tenney out of his refusal. Assuming Mr. Gallagher is not in on some attempt to get Mr. Tenney it would not be much of a conspiracy to go about setting up someone without the participation of the key actors. Evidence in this proceeding indicates that Mr. Gallagher and Mr. Nunez both had the authority to suspend Mr. Tenney for 5 days with intent to discharge without the participation of Mr. Dennison.

I infer from the testimony of John Hetrick, who participated at Step 2 of the grievance procedure and made the decision to discharge Mr. Tenney at that time, that Mr. Tenney was given another chance to return to work. This is an inference, and not a direct finding, based upon Mr. Hetrick's asking Mr. Tenney, "If I asked you to walk now, would you," and Mr. Tenney's reply, "probably not," which was then followed by Mr. Tenney saying that he might, why didn't Mr. Hetrick ask him. I infer that at that point Mr. Tenney was given another chance to snatch victory out of the jaws of defeat and to change his mind. This finding is based upon various accounts of that conversation and the psychology which pervaded the conversation.

In conclusion, on the conspiracy issues even if one were to assume, arguendo, that Dennison and Jones did conspire can it be said that Respondent was discriminating against Mr. Tenney because of safety reasons? The various and numerous prior incidents from 1974 through 1979 which Mr. Tenney has complained of in this proceeding for the most part represent situations where Mr. Tenney was indeed guilty of the infractions which the Respondent charged him with, some of which were found in arbitration. Even assuming, arguendo, that there was a conspiracy, 2/ there is no proof that such a conspiracy was because of safety activities--other than the testimony of Mr. Jones which was general and which I have previously not credited. Had there been a conspiracy, whether on November 30th or at some other time, to bring about Mr. Tenney's discharge, on the basis of this proceeding, it is found that it is more likely that such would have been based upon Mr. Tenney's clearly established prior wrongful conduct or even possibly because of the approach which Mr. Tenney took in carrying out his duties, all of which have been previously described.

Another issue which was litigated and deserves some discussion is whether or not the haulageway on November 30, 1979, was safe for a foot traveler proceeding from the transportation foreman's shanty to old eleven switch. The haulageway was said to be 14 feet wide (Testimony of William R. Toothman) and the complaints which Complainant has expressed in this proceeding concerning its condition are that the top was bad, the top was too low, there was danger of a walking miner being struck by motors traveling down the haulageway, and that the escape holes and crosscuts had poles and cribs in them which might block a miner's entry into them when he was attempting to avoid a motor.

2/ No such finding is made.

Again, the witnesses for Respondent and Complainant differed concerning the safety of this area. In view of my prior rulings, a lengthy analysis of this testimony is not in order. Nevertheless, I do find that the haulageway on November 30, 1979, was safe for a miner traveling it on foot. This finding is based upon the testimony of Respondent's witnesses, Nunez, Gallagher, Lamb, Glen Shamblen, John Hetrick, and Gary Cumberledge. Mr. Hetrick, presently a superintendent of another mine of Respondent, testified that state inspectors or federal inspectors inspect this mine (Federal No. 2) at least every 24 hours. In addition, the Union safety committee helps to see that the mine is kept in compliance.

Gary Cumberledge, an assistant mine inspector employed by Respondent, testified that at request of counsel he made a review of federal and state inspections of the haulageway in question for 6-month periods before and after November 30, 1979, that is, from June 1979, to June 1980, to determine how many accidents had occurred along the haulageway and how many violations had occurred. He testified that there was no record of any roof fall or accidents during this period and that while there were violations none pertained to roof control or shelter holes.

Keeping the foregoing in mind, it is important to consider that the four or five conditions mentioned by the Complainant (in his testimony herein) as present in the mine on November 30, 1979, were all generally described. There was no specific place in the mine mentioned nor specific safety hazard which was raised by Mr. Tenney or has been raised in this proceeding. Witnesses have testified on the one hand that there were derailments and, on the other, that there were not derailments along the haulageway. Witnesses have testified that the top was low, while other witnesses have testified it is not low all the way along the area in question. Witnesses have testified that motormen traveling on their equipment through the haulageway have to bend over and cannot see over the top of the equipment, while another witness has testified that they can see over it. Witnesses have testified that it was safe to duck into a cross way or an escape hole, while other witnesses have said that there might be difficulty doing it because they were filled with timber. The quality of the testimony and the type of testimony with respect to these complaints is all relatively general because the complaints themselves are not specific. Complainant did mention one (specific) incident which occurred in the haulageway on February 20, 1979, when a roof fall occurred. This (incident) was also testified to by David Schaufner, a bolt-machine operator. Mr. Tenney testified that he had that in his mind on November 30, 1979. However, at no time was this expressed. In any event, does Complainant ask that because of that roof fall a finding be made that the haulageway on November 30 was unsafe for anyone to travel it? I find that this evidence does not establish (1) the condition of the haulageway on November 30, or (2) that it would be reasonable for a miner to believe that the haulageway was unsafe on November 30, because of a roof fall in February. Otherwise, if such were the case, one roof fall in an area would permanently close down the area. There was much testimony of similar quality in this record. I find that the fact of the matter is that the haulageway had been in the general condition described by Complainant's witnesses for

a long time and that it was so operating on November 30, 1979, that it was being inspected and repaired regularly, and that there was no showing having any probative value that the haulageway was unsafe at that time. There was no (safety-related) occurrence in proximity to the date of Mr. Tenney's discharge. I find that Mr. Tenney was not reasonably entitled to raise a complaint with respect to the safety of the haulageway on November 30, 1979.

I also find, based upon the testimony of Respondent's witnesses, that miners customarily traveled down the haulageway, and they were not just fire bosses or supervisory personnel but contract employees. In any event, fire bosses and supervisory personnel are "miners" within the meaning of the Act. Complainant might well contend that under the contract what is in issue is the right to a man trip ride down the haulageway. But that is not what is involved in the context of this issue. The question is whether the haulageway was safe and whether whoever was traveling down it, if they are miners (and that includes supervisors, foremen and the like), would be exposed to a hazard. Thus I have found that the haulageway was being walked by miners in different job classifications regularly at that time and that Mr. Tenney was not reasonably entitled to the belief that the haulageway was unsafe on November 30. I infer that this is why he made no such contention at the time. Finally, if the haulageway was as unsafe as claimed by Mr. Tenney and some of his witnesses one would suspect that the Union safety committee would have done something about it during the 2- or 3-day period preceding November 30. Mr. Tenney did not contend or establish that the haulageway was in any different condition or in any unusual condition on November 30, i.e., different from other times prior to or after November 30.

Taking up now another complaint raised by Mr. Tenney, that after he was removed as safety committeeman his roof bolting duties were taken away and that he thereafter spent 90 percent of his time shoveling, the record establishes that this change was necessitated by a change in the safety laws which made it impossible for the Respondent to continue using the type of roof-bolting machine Mr. Tenney was operating at the time. Respondent clearly established that the change in the interpretation of these safety requirements required withdrawal of this type of machine from service. No showing of different or unequal treatment toward Mr. Tenney relative to other employees in this connection was established. No showing or evidence whatsoever that this change in his duties was related to Mr. Tenney's safety complaints or his activities as a safety committee member was presented. Mr. Tenney was given other work at the same rate of pay and he filed no grievance under the Union contract or discrimination charges with the Mine Safety and Health Administration at the time. It is thus found that there is no evidence of disparate treatment, harrassment, or discriminatory motivation involved in this occurrence.

At one stage in this proceeding, Mr. Tenney contended the disciplinary slips which he received for not punching in or out on the time clock on several occasions were part of Respondent's retaliation for his safety activities. Respondent, however, established beyond question that its system for gathering up these time cards at the change of each shift and comparing

them with its personnel roster is automatic. Mr. Tenney's inclusion of these incidents as part of his evidence of alleged animus toward him further colors the credibility to be attached to his ability to objectively interpret the other events he has complained of in this proceeding. (See testimony of Dale Gallagher with respect to the Respondent's procedure.)

Finally, a great deal of the record was devoted to establishing how satisfactory an employee Mr. Tenney was. For the most part, the evidence presented on this topic was in the form of opinion. Again, witnesses on either side of this litigation had different views of Mr. Tenney's worth as an employee. Some said he was lazy, some said he worked hard. Some of the testimony was too remote to be probative. For example, the testimony of Sherman Perkins related to a period in 1971. In any event, it is clear that Mr. Tenney was not discharged because his work performance or production was below par. Nor is there any evidence that his general work performance was unsatisfactory. Respondent's witnesses in one of the arbitration proceedings did indicate that they rated Mr. Tenney in the lower third of the mining force. No evidence was presented that Respondent's management personnel repeatedly or incessantly told Mr. Tenney that his work performance was unsatisfactory or that the amount of work he did was insufficient. Some foremen testified that they considered that it was, but no basis in evidence was established by Respondent to show that he was an unsatisfactory employee. Indeed, Respondent over the period of the years of Mr. Tenney's employment, and during the 2-1/2 years after he was removed from the safety committee, allowed Mr. Tenney to perform his job in the ultra-safe manner that he insisted upon. Considering the length of Mr. Tenney's employment and the absence of comparative statistics comparing Mr. Tenney's experiences with other employees similarly situated, I find no pattern of reprisals, reprimands, harrassment, or even sarcastic remarks has been shown. On the other hand, I also find that Mr. Tenney was not an unsatisfactory worker in terms of production. He was an extremely fastidious person with regard to insisting on the safety aspects of his duties and I accept the characterization of one witness who said that he was "a fair bolter." Finally, however, I do find that the incidents complained of by Mr. Tenney himself in this case do establish somewhat of a record of improper behavior on his part. That has been previously described.

I find that there has been no showing of disparate treatment toward Complainant traceable to his safety activities or otherwise. That is, it was not shown that other miners who refused to obey direct orders were not disciplined or disciplined with the same severity as Mr. Tenney. In this connection, however, Respondent's treatment of Mr. Tenney's helper, Jimmy Moore, should be discussed. Moore did refuse to obey the same order at 8 p.m. as Mr. Tenney did initially, according to Respondent's witnesses. Assuming, arguendo, that this is the case, it is noted that both Mr. Tenney and Mr. Moore were given the opportunity to change their minds. Tenney refused to do so. Moore did change his mind and was put to work. Tenney, even after this point in time, was given the opportunity but did not change his mind. I find no evidence of disparate treatment in these circumstances.

For the reasons stated hereinabove, I find that Complainant failed to establish by a preponderance of the evidence a prima facie case of discrimination. In particular, the Complainant did not establish that he was engaged in a protected activity when he refused to obey a lawful order to walk to his work place during the episode which started at approximately 10 a.m. on November 30, 1979.

Accordingly, it is found that there is no merit in Complainant's complaint filed herein and the same should be dismissed. It is ORDERED that all proposed findings of fact and conclusions of law not expressly incorporated in this decision are REJECTED. For the various reasons stated, this proceeding is DISMISSED.


Michael A. Lasher, Jr., Judge

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ATTACHMENT "A"

Summary of the Documentary Evidence

Joint Exhibit No. 1	National Bituminous Coal Wage Agreement of 1974 (hereinafter, the "Contract").
Joint Exhibit No. 2	Grievance of Carroll Tenney, dated March 7, 1977.
Union Exhibit No. 1	Notice of Improper Action, dated February 18, 1977, for Grievant, Carroll Tenney.
Company Exhibit No. 1	Notice of Suspension with Intent to Discharge, dated February 18, 1977, with accompanying Notice to Return to Work, dated June 21, 1977.

Summary of the Transcript of Testimony

Grievant, Carroll Tenney, roof bolter, works on the day shift at the company's Federal No. 2 Mine, at Miracle Run near Blacksville, West Virginia.

On the morning of Friday, February 18, 1977, Grievant reported at 8 a.m. to the office of Anthony Harris, general mine foreman, for a meeting to discuss progress on the "Two North Tunnel Stall", where Grievant was then working.

Upon completion of the meeting, Grievant went to the dispatcher's shanty at the bottom of the mine. From this point, Grievant and six other employees were planning to commence a safety drill of walking the escapeways. The group proceeded to "One West, Right Side" by portal bus, where they got off and walked the returns to the Scott's Run air shaft. Grievant walked with his roof-bolter helper, Jim Merchant.

The procedure of walking the escapeways was pursuant to the requirement of the Contract that the "Employer shall regularly instruct all Employees as to the location of all escapeways and the proper procedure to be followed in cases of emergency exit." Contract, Article III, Section (o)(12), p. 19.

Upon completing the emergency procedure, Grievant and Merchant returned to the dispatcher's shanty at about 10:30 a.m. to await a mantrip to take them to their work station at "Two North Tunnel Stall".

Glenn Shamblen, transportation foreman, sought to arrange a ride for Grievant and Merchant through Anthony Harris, general mine foreman. Harris determined that there was no transportation available, and then said to

Shamblen: "Let them walk." Grievant, not realizing that Harris was in the area, commented: "That is a long way back." Harris then asked Shamblen again if a ride was available, and upon receiving a negative reply, said to Grievant: "Then you walk."

Grievant remonstrated, and Harris said: "Are you disobeying a direct order?" Grievant replied: "No, I am not disobeying a direct order. The Contract, under Article III, Section (o)(8), guarantees me a ride to and from the working section."

Harris also questioned Merchant as to whether he was refusing to walk, but Merchant replied: "I haven't said anything." Whereupon, Harris put Merchant to work cleaning the transportation shanty. He instructed Robert Sowden, grade foreman, to take Grievant outside and suspend him with intent to discharge. */ Grievant accompanied Sowden to the outside and took a shower. Sowden prepared a "Notice of Improper Action" (Union Exhibit No. 1), and left it on Grievant's basket.

Grievant missed 4 days of work as the result of his suspension, returning to work on February 24, 1977.

Glenn Shamblen, transportation foreman, testified that it would have been as much as 1-1/2 hours before a mantrip would have become available to take Grievant and Merchant to their work stations. A number of other employees obtained rides to their various stations, after walking the escapeways. Some "got on their motors and left"; while others "took the bus and went to the work area" (Tr. 20).

Robert Sowden, general foreman, testified that the "wire men have their own work bus with all their tools" (Tr. 22). This bus might have accommodated Grievant and Merchant, but Sowden did not suggest that it be used to transport them. In his words, "This is not my job. I don't have anything to do with that" (Tr. 23).

Sowden stated that his own jeep was in use on the morning of Friday, February 18, 1977. And the jeep of the general mine foreman, Anthony Harris, was not readily available.

Rodney Jarrett, mine superintendent, testified that a majority of the employees are furnished transportation to and from their work areas, by the use of individual pieces of equipment, portal buses, or jeeps.

Anthony Harris, general mine foreman, testified further that the clause in the Contract dealing with mantrips to and from the working section was

*/ Grievant was suspended for 5 days with intent to discharge. The company, however, ordered him back to work on the fifth day (February 24, 1977). As a result, his right to compensation, if any, cannot exceed 4 days (Friday, February 18, and Monday, Tuesday, and Wednesday, February 21 through 23, 1977).

applicable at the beginning and end of every shift, but "doesn't include the middle of the day" (Tr. 14). On a prior occasion, Harris had insisted that Grievant ride, rather than walk, to and from his work station at the beginning and end of his shift.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 27 1981


SECRETARY OF LABOR,	Petitioner	:	Civil Penalty Proceeding
		:	
v.		:	Docket No. WEVA 80-730
		:	A.C. No. 46-02856-03004 R
FANCY MINING COMPANY, INC.,		:	
	Respondent	:	J & J No. 2 Mine

DECISION AND ORDER APPROVING SETTLEMENT

This proceeding was commenced by the Secretary of Labor, Mine Safety and Health Administration (hereinafter "MSHA") on November 10, 1980, by the filing of a petition for assessment of civil penalty. On April 20, 1981, the parties filed a joint motion for an order approving settlement of this case, which I subsequently denied in an order dated July 6, 1981. A hearing was held on the matter on September 15, 1981, in Morgantown, West Virginia. Barry Lane Ryan testified on behalf of MSHA and John A. Laurita testified on behalf of both MSHA and Fancy Mining. At the close of the hearing, the parties indicated their desire to have their motion to approve settlement reconsidered. I stated at that time that I would rule upon the renewed motion after posthearing briefs were submitted and the record was closed.

Having duly considered the testimony and other evidence, I conclude that the recommended settlement is consistent with the purposes and policy of the Act. The recommended settlement, reducing the penalty from \$10,000.00 to \$2,000.00, is therefore, approved.

Accordingly, it is ORDERED that the motion to dismiss and approve settlement is GRANTED. It is FURTHER ORDERED that the operator pay \$2,000 and that subject to such payment the petition be DISMISSED.


James A. Laurenson, Judge

Distribution Certified Mail:

Page Jackson, Esq., Office of the Solicitor, U.S. Department of Labor,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

NOV 30 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 80-375-M
Petitioner	:	A/O No. 12-00083-05004 I
v.	:	
	:	Eckerty Quarry
MULZER CRUSHED STONE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Steven E. Walanka, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner; Philip E. Balcomb, Manager, Mulzer Crushed Stone Company, Tell City, Indiana, for the Respondent.

Before: Judge Cook

I. Procedural Background

On August 27, 1980, the Secretary of Labor (Petitioner) filed a proposal for a penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act), charging Mulzer Crushed Stone Company (Respondent) with a violation of mandatory safety standard 30 C.F.R. § 56.9-55. The Respondent filed an answer on September 24, 1980.

The hearing was held on January 29, 1981, in Louisville, Kentucky. Representatives of both parties were present and participated. Both parties made closing arguments following the presentation of the evidence.

At the conclusion of the hearing, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, difficulties experienced by counsel resulted in a revision thereof.

Posthearing briefs were received from the Respondent and the Petitioner on March 23, 1981, and April 27, 1981, respectively. The Respondent's reply brief was received on May 1, 1981. The Petitioner did not file a reply brief.

II. Violation Charged

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>
65911	April 23, 1980	56.9-55

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called Federal mine inspector Gene Upton as a witness.

The Respondent called as its witnesses Clifton Cook III, a stockpile truck driver, Gordon Ray Eckert, the supervisor in direct charge of operations at the Eckerty Quarry, and Robert Scheible, the assistant safety director.

Both the Petitioner and the Respondent called as a witness John E. Knust, the stockpile truck driver involved in the April 10, 1980, accident.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

G-1 is a copy of a mine accident, injury, and illness report submitted to the Mine Safety and Health Administration by the Respondent following the April 10, 1980, accident.

G-2 is a copy of Citation No. 365911, April 23, 1980, 30 C.F.R. § 56.9-55.

G-3 is an April 22, 1980, photograph of the stockpile where the accident occurred.

G-4 is an April 22, 1980, photograph taken from the top of the stockpile where the accident occurred.

G-5 is an April 22, 1980, photograph of the ramp leading to the top of the stockpile where the accident occurred.

G-6 is an April 22, 1980, photograph taken from the top of the stockpile where the accident occurred.

G-7 is an April 22, 1980, photograph showing the stockpiling method in use on the day of the accident investigation conducted by the Mine Safety and Health Administration.

G-8 is an April 22, 1980, photograph showing the stockpile after the departure of the truck shown in G-7.

G-9 is an April 22, 1980, photograph of the truck involved in the accident.

G-10 is an April 22, 1980, photograph of the truck involved in the accident.

G-11 is an April 22, 1980, photograph of the truck involved in the accident.

G-12 is a copy of the accident investigation report prepared by the Mine Safety and Health Administration following its investigation of the April 10, 1980, accident.

G-13 is a copy of the inspector's statement pertaining to G-2.

G-14 is a copy of a "fatalgram" dated May 5, 1980.

G-15 is a copy of a "fatalgram" dated June 19, 1980.

G-16 is a copy of a "fatalgram" dated July 15, 1980.

G-17 is a copy of a mine accident, injury, and illness report of an accident occurring at the Respondent's Eckerty Quarry on April 28, 1978.

G-18 is a copy of the mine identification.

2. The Respondent introduced the following exhibits in evidence:

O-1 is a diagram depicting the general conditions existing at the stockpile at the time of the accident.

O-2 is a copy of the "narrative findings for a special assessment" prepared by the Office of Assessments.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of mandatory safety standard 30 C.F.R. § 56.9-55 occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The parties filed a partial stipulation on January 29, 1981, which states, in part, as follows:

[a.] This shall be a partial stipulation of some of the facts and issues involved in the above-captioned case and shall not be construed as precluding either party from presenting additional evidence to the Court.

[b.] That the Administrative Law Judge has jurisdiction in matters related to the Federal Mine Safety and Health Act of 1977.

[c.] That the inspectors who issued the Citation and Order were duly authorized representatives of the Secretary of Labor.

[d.] That the size of the company as to production tons or manhours per year is 469971, as shown in Exhibit A.

[e.] That the size of the mine as to production tons or manhours per year is 101812, as shown in Exhibit A.

[f.] That the previous assessed penalty for Citation 365911 was \$2,000.00, as shown in Exhibit B.

[g.] That the proposed assessment of penalty for Citation 365911 is \$1,200.00, as shown in Exhibit C.

[h.] That respondent issued a notice of contest to the Mine Safety and Health Administration on July 24, 1980.

[i.] That the Proposal For Penalty was filed on August 25, 1980.

[j.] That respondent received the Proposal For Penalty on August 28, 1980, as shown in Exhibit D.

[k.] That respondent filed an answer to the Proposal For Penalty on September 22, 1980.

[l.] That the proposed assessment will not harm respondent's ability to continue its operations.

[m.] That Citation 356911 has been terminated as shown in Exhibit E.

[n.] That respondent owned and operated a 1967 model Ford - L-800 SN F 80 FUA45485, single axle, 8-ton capacity dump truck.

[o.] That respondent operates a limestone (crushed and broken) type facility.

2. The parties also stipulated that the Respondent is engaged in interstate commerce and that the Respondent is subject to the provisions of the 1977 Mine Act (Tr. 7).

B. Occurrence of Violation

Citation No. 365911 was issued to the Respondent on April 23, 1980, by Federal mine inspector Gene Upton. The citation charges the Respondent with a violation of mandatory safety standard 30 C.F.R. § 56.9-55 in connection with a nonfatal accident which occurred at its Eckerty Quarry on April 10, 1980, in that:

The loose unconsolidated ground at the dumping point of the agricultural lime stockpile was not sufficient to support the weight of the Ford L 800 Serial No. F80FUA45485. The agricultural lime was approximately 45 feet in height and 90 feet in width at the dumping point. The Ford stockpile truck L 800 Serial No. F80FUA45485 overtraveled at this dumping point on [April 10, 1980] and approximately 7:30 a.m. was the time of the accident.

(Exh. G-2).

The agricultural lime stockpile was roughly 45 feet in height and was roughly 100 feet in width across the top. 1/ It had sloping sides and a berm around the edge at the top except in the area directly affected by the activities of the front-end loader in use at the base of the stockpile. The front-end loader was removing agricultural lime from the stockpile and loading it onto customers' trucks (Exh. 0-1). 2/ The activities of the front-end loader had caused in that area both the formation of a vertical face on the side of the stockpile and the destruction of the berm. Both conditions developed as a result of material caving off from the side of the stockpile.

Mr. John E. Knust, one of the Respondent's stockpile truck drivers and the individual involved in the accident, reported for work at the Eckerty Quarry at approximately 7 a.m. on April 10, 1980. He acquired a load of agricultural lime from the bins and drove up the ramp leading to the top of the stockpile. 3/ Upon reaching the top, he backed his truck into position to dump his load. He stopped approximately 10 feet from the edge in an area directly above the vertical face of the stockpile created by the activities

1/ The measurements were taken during the course of the April 22, 1980, accident investigation conducted by the Mine Safety and Health Administration. The Federal mine inspectors were informed by employees of the company that the conditions were approximately the same as those which had existed at the time of the accident.

2/ The load-out operations began at approximately 5:30 a.m. on April 10, 1980.

3/ Mr. Knust was using a Ford L-800, 8-ton capacity dump truck on the day of the accident (see Tr. 16, 44, Stipulation 1n.).

of the front-end loader working below (Exh. 0-1). For the reasons noted previously, there was no berm behind the truck. 4/ As the truckbed began to rise, the ground beneath the truck gave way causing the truck to slide down the side of the stockpile and overturn as it neared the bottom demolishing the cab (Exhs. G-9, G-10). The accident occurred at approximately 7:30 a.m. after Mr. Knust transported what was to have been his first load of material to the stockpile that day.

Mandatory safety standard 30 C.F.R. § 56.9-55 provides that "[w]here there is evidence that the ground at a dumping place may fail to support the weight of a vehicle, loads shall be dumped back from the edge of the bank." The regulation thus requires that where there is evidence that the ground at a dumping place may fail to support the weight of a vehicle, loads shall be dumped at a sufficient distance from the edge of the bank to prevent a ground collapse.

The fact that the accident occurred indicates that dumping was not being performed at a sufficient distance from the edge of the stockpile to prevent a ground collapse. The evidence presented, as set forth in the testimony of Inspector Upton and as confirmed by the testimony of other witnesses, demonstrates that ample evidence was present on April 10, 1980, to show that the ground beneath the truck may have been inadequate to support its weight.

The ground was moist on April 10, 1980, as a result of recent rainfall. Inspector Upton testified as an expert in the field of mine safety and health that agricultural lime is partially dust and partially a granular material which is affected by rainfall. The inspector further testified that rainfall causes an erosion effect and washes away the finer dust leaving the granular material, which would be unconsolidating. According to the inspector, this would cause the agricultural lime pile to become "softer". Additionally, he testified that loading out material from the side of the stockpile would cause the ground atop the stockpile to be unstable, and that such instability could be detected by examining the edge of the pile in that the material would be caving off and causing different types of faces at different times. In the inspector's opinion, the accident was caused because the loose, unconsolidated ground was insufficient to support the weight of the truck. The moisture, the type of ground and the vertical face were the physical factors upon which his opinion was based.

Mr. Knust gave testimony at one point which supports the conclusion that the rainfall had adversely affected the agricultural lime stockpile. He testified that the ground was damp as a result of the recent rainfall and that the ground "was usually harder" than it was on April 10, 1980 (Tr. 16-17). 5/

4/ Mr. Knust testified that he misjudged the location of the berm while backing into position. He glanced out of his rearview mirror and thought that one side of the truck was going to be against a berm (Tr. 106, 110). This belief proved erroneous.

5/ Mr. Knust attempted to retract this statement several questions later by maintaining that the rainfall had made the ground harder, not softer, because

Messrs. Knust and Eckert gave testimony which supports the conclusion that the load-out activities underway at the base of the stockpile and the associated vertical face on the side of the stockpile were evidence that the ground at the dumping place could fail to support the weight of the truck. When asked whether he observed any ground condition which would have indicated that it was unsafe "to put your truck where it was," Mr. Knust testified that the "only thing is that I seen that they were loading out at that particular place on the pile". Mr. Eckert testified that the worst hazard in stockpiling is associated with the load-out operation because loading-out causes the remaining material on the side of the pile to slide downwards.

The Respondent has placed great emphasis on its purported requirement that loads be dumped at least 10 feet from the edge of the stockpile where berms are absent in arguing that no violation occurred. The Respondent maintains that "[s]ince the cited standard does not specify a distance, but only requires that loads be dumped 'back from the edge,' the distance of ten feet established by the company and adhered to by Mr. Knust is reasonable and in compliance" (Respondent's Posthearing Brief, p. 3). The Respondent's argument is not well founded. Mr. Robert Scheible, the Respondent's assistant safety director, testified only that in his opinion dumping 10 feet from the edge would be sufficient in most cases. He conceded that under some circumstances dumping 50 feet from the edge would be insufficient and maintained that a driver must use his own judgment as to "whether 10 feet, 20 feet, 30 feet or 40 feet, or maybe not at all is sufficient" (Tr. 174). He further testified that "[w]e dump every day on these piles and there is certainly a lot of them being dumped closer than 10 foot" (Tr. 174-175). In summary, Mr. Scheible's testimony establishes that a fixed distance requirement is not adequate under all circumstances to assure the requisite protection against the hazards associated with ground failure, and that loads at the Eckerty Quarry are in fact dumped at distances less than 10 feet from the edge of the stockpile. It is clear beyond any doubt that 10 feet was inadequate in view of the conditions existing on April 10, 1980.

In view of the foregoing, I conclude that a violation of mandatory safety standard 30 C.F.R. § 56.9-55 has been established by a preponderance of the evidence.

C. Negligence of the Operator

Mr. Gordon Ray Eckert, the supervisor in direct charge of operations at the Eckerty Quarry, arrived at the facility at approximately 6:30 a.m. on

fn. 5 (continued)

agricultural lime gets harder when it gets wet (Tr. 18). Such attempted retraction is not considered credible. It should also be noted that both Mr. Clifton Cook III, another one of the Respondent's stockpile truck drivers, and Mr. Gordon Ray Eckert, a supervisor, testified that agricultural lime hardens when it gets wet (Tr. 81, 117). Their testimony on this point is considered insufficient to establish the actual condition of the ground at the time of the accident in view of the credible testimony of Mr. Knust that the ground was usually harder than it was on April 10, 1980.

April 10, 1980 (Tr. 139-140). It was customary for Mr. Eckert to make a series of rounds upon reporting for work which entailed driving first through the quarry area and thereafter examining the stockpiles (Tr. 121, 140). His customary practice was to drive atop the stockpile and perform an examination so as to detect any hazards (Tr. 121). On the morning of April 10, 1980, he drove around the subject stockpile passing within 45 feet of it. However, for some unexplained reason, he did not drive atop it (Tr. 120-122, 140, 145).

In view of the activities of the loader operator and the readily visible condition arising as a consequence of his activities, Mr. Eckert was under an affirmative obligation to perform a more thorough examination of the stockpile, which would have included driving atop it, designed to detect the hazardous condition developing and to thereafter undertake effective steps designed to prevent the occurrence of the type of accident involved herein.

It should be noted that the Respondent had given Mr. Knust some initial training in stockpiling which included instructions that he get out of the truck and examine the ground atop the stockpile prior to backing the truck into position to dump a load of agricultural lime. Mr. Knust was negligent in that he failed to perform such an examination on April 10, 1980. However, when viewed in context, it is clear that the Respondent was under an obligation to provide additional instructions to Mr. Knust on April 10, 1980, because he had been working as a full time stockpile truck driver for only approximately 1 week prior to the accident. As stated in the preceding paragraph, Mr. Eckert was under an affirmative obligation to perform a more thorough examination of the stockpile designed to detect the hazardous condition developing and to thereafter undertake effective steps designed to prevent the occurrence of the type of accident involved herein. In view of Mr. Knust's relative inexperience, such effective steps would have included either giving Mr. Knust additional instructions in stockpiling specifically tailored to the hazards then existing or instructing the loader operator to establish a berm atop the stockpile in the affected area.

In view of the foregoing, it is found that the Respondent demonstrated a high degree of ordinary negligence in connection with the violation.

D. Gravity of the Violation

The ground beneath the truck gave way causing the truck to slide down the side of the agricultural lime stockpile, overturn and land upside down demolishing the cab (Exhs. G-9, G-10). The driver was knocked unconscious and received bruises to the chest, right shoulder and hip, and received lime dust in his eyes (Exh. G-12). The driver lost 6 to 8 workdays as a result of the accident.

Although the injuries sustained were not more severe, it is clear that Mr. Knust was exposed to potentially fatal or potentially permanently disabling injuries. In view of all of the circumstances surrounding the accident, it is found that the violation was extremely serious.

E. Good Faith in Attempting Rapid Abatement

The citation was terminated within the time period specified for abatement (Exh. G-2). Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

F. Size of the Operator's Business

The parties stipulated that the Respondent's size is rated at 469,971 annual production tons or man-hours, and that the size of the Eckerty Quarry is rated at 101,812 annual production tons or man-hours.

G. History of Previous Violations

No evidence was presented to establish that the Respondent has a history of previous violations for which assessments have been paid. 6/ Accordingly, it is found that the Respondent has no history of previous violations cognizable in this proceeding.

6/ Exhibit B attached to the partial stipulation filed on January 29, 1981, contains the statement that the Respondent had a total of seven assessed violations during the preceding 24 months. However, in view of the wording of the stipulation, it is clear that the parties did not stipulate this figure into the record.

However, assuming for purposes of argument that this figure is properly part of the record in this case, it cannot be determined therefrom that the Respondent has a history of previous violations which is cognizable in this proceeding. First, it appears that the 24 months was measured with reference to April 23, 1980, and not with reference to the date of the violation. The appropriate point of reference for determining the Respondent's history of previous violations is the date of the violation, April 10, 1980, and not the date when the citation was issued, April 23, 1980. It cannot be determined how many, if any, of the seven assessed violations occurred prior to April 10, 1980. Second, there is no indication that the Respondent has actually paid civil penalties for any or all of the seven assessed violations. It is well settled that paid assessments are the only assessments properly included in a mine operator's history of previous violations. See Peggs Run Coal Company, Inc., 6 IBMA 212, 83 I.D. 245, 1976-1977 CCH OSHD par. 20,839 (1976); Peggs Run Coal Company, Inc., 5 IBMA 144, 148-150, 82 I.D. 445, 1 BNA MSHC 1343, 1975-1976 CCH OSHD par. 20,001 (1975); Old Ben Coal Company, 4 IBMA 198, 217-218, 82 I.D. 264, 1 BNA MSHC 1279, 1974-1975 CCH OSHD par. 19,723 (1975); Corporation of the Presiding Bishop, Church of Jesus Christ of Latter Day Saints, 2 IBMA 285, 80 I.D. 633, 1973-1974 CCH OSHD par. 16,913 (1973); Valley Camp Coal Company, 1 IBMA 196, 203-204, 79 I.D. 625, 1 BNA MSHC 1043, 1971-1973 CCH OSHD par. 15,385 (1972).

H. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

The parties stipulated that the payment of a \$1,200 civil penalty will not harm the Respondent's ability to continue its operations. Additionally, no evidence was presented by the Respondent to show that the assessment of a civil penalty greater than \$1,200 will affect its ability to remain in business.

In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972), the Federal Mine Safety and Health Review Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty.

In view of the foregoing, I conclude that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to remain in business.

VI. Conclusions of Law

1. Mulzer Crushed Stone Company and its Eckerty Quarry have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Gene Upton was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation No. 365911, April 23, 1980, 30 C.F.R. § 56.9-55.

4. The violation charged in Citation No. 365911, April 23, 1980, 30 C.F.R. § 56.9-55, is found to have occurred.

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Both parties delivered closing arguments on January 29, 1981. The Respondent and the Petitioner filed posthearing briefs. The Respondent filed a reply brief. Such closing arguments and briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

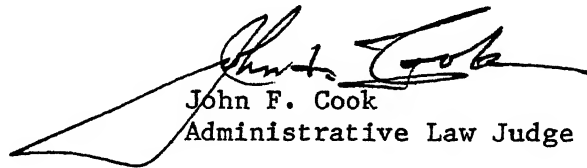
VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a civil penalty is warranted as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
365911	April 23, 1980	56.9-55	\$800

ORDER

The Respondent is ORDERED to pay a civil penalty in the amount of \$800 within 30 days of the date of this decision.


John F. Cook
Administrative Law Judge

Distribution:

Steven E. Walanka, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Chicago, IL 60604 (Certified Mail)

Philip E. Balcomb, Manager, Mulzer Crushed Stone Company, P.O. Box 248, Tell City, IN 47588 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health,
U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 30 1981

OLD DOMINION POWER COMPANY,	:	Contest of Citation
Contestant	:	
	:	Docket No. VA 81-40-R
v.	:	Citation No. 688762-1
	:	January 21, 1981
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Westmoreland Coal Company's
ADMINISTRATION (MSHA),	:	Central Machine Shop
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 81-65 <u>1</u> /
Petitioner	:	Assessment Control
	:	No. 44-03108-03001 F KG2
v.	:	
	:	Westmoreland Coal Company's
OLD DOMINION POWER COMPANY,	:	Central Machine Shop
Respondent	:	

DECISION

Appearances: William D. Lambert, Esq., Ogden, Robertson & Marshall, Louisville, Kentucky, for Old Dominion Power Company; Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, for Secretary of Labor.

Before: Administrative Law Judge Steffey

Pursuant to an order issued March 20, 1981, a hearing in the above-entitled proceeding was held on April 22, 1981, in Wise, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

At the conclusion of the hearing, counsel for the parties indicated that they would like to file posthearing briefs. Counsel for Old Dominion Power Company (hereinafter referred to as OD) filed his brief on July 17, 1981, and counsel for the Secretary of Labor and the Mine Safety and Health Administration (hereinafter referred to as MSHA) filed his brief on July 15, 1981. 2/

1/ The actual Petition for Assessment of Civil Penalty had not been filed in Docket No. VA 81-65 at the time the hearing was held, but my order issued March 20, 1981, consolidated the civil penalty issues with the issues raised by the Notice of Contest. Therefore, the civil penalty issues are ripe for decision on the basis of the record made in this proceeding.

2/ This decision has been delayed by the fact that I was out of the office for 4 weeks because of an eye operation.

Issues

Although the parties' briefs discuss identical issues, I have elected to use the phraseology employed in OD's brief to state the issues because all of the issues are hereinafter decided adversely to OD. If OD files a petition for discretionary review, the Commission's determinations will be facilitated by my having arranged my decision so as to track the issues raised in OD's brief. Those issues are listed below:

(1) Is OD an "operator" or "independent contractor" within the scope of the Act?

(2) Are MSHA's regulations defining "operators" arbitrary and capricious and unconstitutional delegations of legislative authority?

(3) Is OSHA responsible for [investigating] the conduct cited by MSHA?

(4) Is a 1-year delay in issuing a citation "reasonable promptness" as required by the Act?

(5) Is any civil penalty justified?

Findings of Fact

My decision will be based on the findings of fact set forth below. My findings include all of the principal facts on which the parties rely in support of their arguments.

1. Old Dominion Power Company is a subsidiary of Kentucky Utilities Company and purchases from its parent company all of the electricity it sells to its customers (Tr. 39). OD does not own or operate any generating facilities. OD's service area is located entirely in Southwestern Virginia and is comprised of the counties of Lee, Wise, Scott, Dickenson, and Russell. OD employs about 80 persons, including service men, meter readers, substation technicians, office clerks, engineers, customer service representatives, and janitors (Tr. 17). Its sales of electricity amount to \$24,000,000 on an annual basis (Tr. 23). OD does not own mining properties and is not involved in operating coal mines or any other type of mine (Tr. 18).

2. OD is regulated by the Virginia State Corporation Commission and the rate schedules and contracts under which it sells electric power are on file with that Commission (Tr. 17). OD owns poles, towers, fixtures, wire, conductors, and other facilities used in the transmission, distribution and sale of electrical energy and its facilities are subject to inspection by the Occupational Safety and Health Administration (Tr. 12; 18; 71-72).

3. OD does not normally perform construction work for which it makes a special charge. During the last 10 years, for example, in only four instances did it perform work which it agrees would permit it to be given the label of a "contractor". Those instances involved the installation of some poles, wires, and metering equipment. In one instance, the charge for the work was between \$2,500 and \$3,000 and the total amount involved in the other three cases would

not exceed \$1,000. The largest charge related to some metering equipment installed for a coal company other than the coal companies specifically involved in this proceeding (Tr. 21-23).

4. OD serves all customers of all types in its service area, including coal companies, manufacturing companies, clothing stores, fast-food restaurants, and residences. It has more residential customers than any other type of customers (Tr. 19). Westmoreland Coal Company is among the customers which OD serves. OD's contracts with Westmoreland and its predecessor, Stonega Coal and Coke Company, date back to 1917 (Tr. 23). The contract with Westmoreland was updated in December 1952, to be effective on January 1, 1953, and provides for specific delivery points and voltages, with the right of Westmoreland to seek additional points of service (Tr. 24). OD presently has about 20 places where service is rendered to Westmoreland, some for Westmoreland's own use and some for operations involving companies which have contracted to mine coal for Westmoreland (Tr. 28).

5. The electrical substation involved in this proceeding was erected on land owned by Penn-Virginia Resources Corporation and leased by Westmoreland. Power from the substation is received for use in a mine which Westmoreland has leased to Elro Coal Corporation and all coal produced by Elro is sold to Westmoreland which, in turn, sells the coal for steam generating purposes (Tr. 13). Westmoreland hired Vanderpool Electric Corporation to construct a transmission line from one of its existing substations to the substation involved in this proceeding (Tr. 43). The substation was constructed by Westmoreland so that Elro could receive power to operate the equipment in its No. 3 Mine and Westmoreland operates the substation and is billed by OD for power received at the substation (Tr. 27-28).

6. The only facilities installed by OD's employees at the substation consist of three current transformers, two potential transformers, and a meter (Tr. 34). Two of OD's employees had been to the substation to install those facilities prior to the time the substation was first energized (Tr. 35). OD did not charge Westmoreland any specific fee for installing the facilities other than the charge which OD makes for power delivered to the substation. OD does not consider the installation made at the substation to be any different from the type of work which is done at any other delivery point to any other type of customer (Tr. 29). Occasionally, OD installs check meters for some of its customers, but when it does so, it only charges its customers the price which it pays for such equipment, plus storage, freight, and handling expenses (Tr. 29). OD normally does not have to send its personnel to a substation more than once each month for the purpose of reading the meter, unless some special problem occurs (Tr. 35). If problems do occur at a substation, the customer calls OD and OD's employees determine what the cause of the problem is and make repairs, acting independently of its customer's employees if the problems are related to the facilities installed by OD (Tr. 81).

7. Inasmuch as this proceeding involves a fatal accident which occurred at the substation discussed above, it is necessary that the substation be

described in some detail. The substation is surrounded by a wire fence and has a gate on one side. The substation's purpose is to reduce the incoming voltage from 12,470 volts to the voltage which is used in Elro's No. 3 Mine (Tr. 26). Exhibit D is a picture of the substation. There are poles and crossbars on the left and right sides of the substation. High voltage comes into the substation from the left side and the voltage is reduced by the large transformers sitting on the ground at the left side of the substation (Tr. 50-51). The facilities installed by OD are situated on the bottom crossbar of the two poles on the right side of the substation. The meter may be seen on the pole in the foreground of Exhibit D and the current and potential transformers are located on the bottom crossbar which is situated just above the meter (Tr. 48).

8. Exhibit E is a picture of the fuse disconnects through which the high voltage passes before entering the transformers for voltage reduction. The fuse disconnects are shown in the middle of Exhibit E and may also be seen on the crossbar closest to the ground on the poles on the left side of Exhibit D (Tr. 52). A fuse link extends between the holders located on each end of the two-part insulators. The high voltage passes through the fuse link unless a short circuit or other problem causes an overload on the system to burn out the element in the fuse link so as to interrupt the flow of current (Tr. 59). Fuse links of several types were described at the hearing and samples of two types were introduced in evidence as Exhibits F and I. Exhibit F is a type which passes through a tube about 1 inch in diameter. The tube is attached to both ends of the fuse holders shown in Exhibits D and E. If the fuse link burns out or power to the substation is interrupted, the tube (or barrel) falls down from the top holder and hangs in a vertical position from the bottom holder, as shown in the diagram which is Exhibit G in this proceeding (Tr. 53-56). The other type of fuse link is similar to the wire described above, but it is not installed inside a tube and therefore may be in place and power may be flowing through it without its exhibiting any signs as to whether it is "alive" with power flowing through it or "dead" with no energy flowing through it (Tr. 58; 101).

9. The substation was first energized about 5 or 6 p.m. on January 21, 1980, by Westmoreland's electrical foreman, Terry Mullins. The next day, January 22, about 8:15 a.m., Mullins talked to OD's superintendent of meters, Jack Carr, on the telephone and expressed to Carr his doubts as to whether Old Dominion's meter at the substation was working properly because no light was visible in the meter and because the disk in the meter was turning counterclockwise. In Carr's opinion, the disk was supposed to turn counterclockwise, but, to make certain that there was nothing wrong with the meter, he sent two employees to the substation to check the meter (Tr. 99-100). The two employees were James Harlow, a substation technician, and Leonard Lambert, a meter man, first class (Tr. 44; 48; 88). Harlow had helped install the current and potential transformers and meter at the substation. Lambert would normally have participated in the installation, but he was on vacation when the equipment was originally installed sometime in December 1979 (Tr. 88). Lambert had, however, gone to the substation on January 21 and had installed a replacement meter (Tr. 89).

10. When Harlow and Lambert arrived at the substation, Harlow, who was on the side of the van nearest to the substation, jumped out and looked at the fuse disconnects described in Finding No. 8 above. He was used to seeing the type of fuse link which is installed inside a tube. It was foggy and he did not see any tube or wire between the fuse holders or hanging down from the bottom holder, so he concluded that the substation was deenergized. Lambert took Harlow's word for the fact that the substation was deenergized (Tr. 49; 90-91). They did not at first go inside the fence around the substation to look at the meter because they concluded that the meter could not be checked while no power was flowing through it (Tr. 91; 94; 121). Although the substation was energized and there was a hum coming from the transformers (Tr. 49; 105), they apparently did not hear the hum because of noise coming from a nearby generator (Tr. 119).

11. Harlow and Lambert returned to their van, started the engine, and were ready to leave when it occurred to them that the GE transformers they had installed were of a new type and might have a rating of 5 KW instead of the 15 KW which they should have had. They decided to check the nameplate on the transformers to determine their classification. Harlow put on climbing equipment and went up the pole to examine the nameplate. He could not see the plate clearly because of water on it. He reached out with one hand to rub the water off the nameplate and was immediately electrocuted when his hand touched the energized transformer (Tr. 63; 91-96).

12. OD has a safety program and has safety meetings of various kinds on a weekly and quarterly basis (Tr. 67-70). OD's Safety Manual provides in Part III, Section 1, Paragraph 31-1, "Electrical equipment and lines shall always be considered to be energized unless they are positively proven to be deenergized and properly grounded. IF IT ISN'T GROUNDED--IT ISN'T DEAD!" (Exh. H; Tr. 65). Part I, Section 1, of the rules provides in paragraph 11-1(b) that each employee "* * * shall carefully study (not merely read)" the safety rules applying to his duties and specifies that "* * * ignorance will not be accepted as an excuse for their violation." Additionally, the same paragraph provides that employees may be periodically examined on their knowledge of the rules (Tr. 65-66).

13. The fatal accident was investigated by OD and by both OSHA and MSHA. OD's general manager, H. E. Armsey, stated that OSHA did not cite the company for any violation in connection with the accident because the deceased employee "* * * had violated a long-standing rule of the electrical utility industry as well as Old Dominion Power Company's" (Tr. 71). Several of MSHA's employees, including an electrical engineer named Roy Davidson, participated in investigating the accident. After the investigation had been completed, Davidson concluded that OD's employees had violated 30 C.F.R. § 77.704 which provides, in pertinent part, that "[h]igh-voltage lines shall be de-energized and grounded before work is performed on them". Davidson explained that in some circumstances, not applicable in this proceeding, work may be done on high-voltage lines while they are energized (Tr. 114-117). When work is done on energized high-voltage lines, special protective equipment must be utilized. Section 77-704-2(4) prohibits persons from working on energized high-voltage equipment if adverse weather conditions exist. Since it was rainy and foggy on the day of the accident, OD's employees would have acted

in violation of section 77.704 even if they had utilized special protective equipment and clothing (Tr. 136).

14. Although Davidson concluded very shortly after the investigation that a violation of section 77.704 had occurred, confusion arose as to which entity should be cited for the violation because Elro Coal Corporation was using the power received at the substation, Westmoreland owned and operated the substation, and OD's employees did the work which caused the fatal accident (Tr. 109). Davidson first issued a citation to Elro and thereafter was directed to reissue the citation in Westmoreland's name. He reissued it on April 3, 1980, citing Westmoreland for the violation (Exh. 2). After the citation in Westmoreland's name had been sent to the Assessment Office for processing under the civil penalty provisions of the Act, Davidson was directed to vacate the citation issued to Westmoreland and reissue it in the name of OD because, by then, the rulemaking proceedings providing for citing independent contractors for violations occurring at coal mines had been completed (Tr. 111-113). Therefore, Davidson issued Citation No. 668762 on January 19, 1981, as modified on January 21, 1981, citing Old Dominion for a violation of section 77.704 in connection with the fatal accident (Exh. 1; Tr. 113).

15. Davidson's statement evaluating the penalty-assessment criteria of negligence, gravity, and good-faith abatement was received in evidence as Exhibit 3. Davidson considered OD to have been nonnegligent because the person who was killed had been told before he left his duty station that the substation had been energized (Tr. 128). Davidson considered the violation to have been very serious since a person was fatally injured (Tr. 128). He believed that OD had shown a good-faith effort to achieve compliance because its employees were reinstructed in safe procedures for making repairs on high-voltage systems within the time provided in the citation (Exh. 3; Tr. 139).

Consideration of Parties' Arguments

1. Is OD an "operator" or "independent contractor" within the scope of the Act?

OD's brief (pp. 9-14) contends that it is not an "operator" or an "independent contractor" within the meaning of section 3(d) of the Act. Section 3(d) defines an "operator" as follows:

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

OD's brief (pp. 9-10) begins its argument that it is not an "operator" within the meaning of section 3(d) by noting that the definition of "operator" in the 1969 Act did not specifically refer to independent contractors at all. OD concedes that the definition of "operator" was broadened in the 1977 Act to cover independent contractors, but OD cites language from the legislative history which, it says, shows that Congress did not intend for an independent contractor to be considered as an "operator" unless such independent contractor has a continuing presence at the mine and unless such independent contractor is "under contract or otherwise, engaged in the extraction process for the

benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the "[1977 Act].3/

OD's brief (p. 11) next relies upon a quotation from National Indus. Sand Ass'n v. Marshall, 601 F.2d 689 (3rd Cir. 1979), in which the court stated (at page 701):

* * * The reference made in the statute only to independent contractors who "perform[] services or construction" may be understood as indicating, however, that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed. * * *

OD argues that it is required to serve all customers within its service area, including Westmoreland Coal Company, with electricity. OD claims that its meter is situated in a coal company's substation, but that the substation is a considerable distance from any actual mine site where coal is produced. OD states that the only reason its personnel visit a substation is to install, read, inspect, and repair meters and related equipment. OD claims that its services at a substation are for its own benefit so that it can send a bill to its customer for power it has used. In such circumstances, OD argues that its services are certainly de minimis and that it may not properly be found to be an "operator" within the meaning of section 3(d) of the Act.

OD's next argument (Br., p. 12) is that interpretations of whether a company is an "operator" within the meaning of section 3(d) should be made under the rule of ejusdem generis so that an independent contractor should not be found to be an "operator" unless its activities would justify placing it in the category of an "owner" or "lessee" to which reference is first made in section 3(d). OD points to the National Indus. Sand case, supra, and notes that the court in that case stated that the principle of ejusdem generis had been used by another court in Association of Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), to find that the words "other persons" in section 3(d) includes independent contractors who "control, operate or supervise a coal mine". OD contends, however, that a similar conclusion would be improper as to OD in this proceeding because OD does not have a "substantial participation in the running of" a coal mine as the court in National Indus. Sand case thought was necessary before an independent contractor can be found to be an "operator" within the meaning of section 3(d).

OD's brief (p. 13) next cites a sentence from National Indus. Sand in which the court stated (601 F.2d at 702, fn 43):

3/ The quotation above is taken from a paragraph appearing on page 14 of Senate Report No. 95-181, 95th Congress, 1st Session, or page 602 of the Legislative History of the Federal Mine Safety and Health Act of 1977 prepared for the Subcommittee on Labor of the Committee on Human Resources, United States Senate, July 1978.

* * * Inclusion as operators of those coal mine construction companies which "do control and supervise the construction work they have contracted to perform" would in all likelihood as Bituminous Contractors presages, constitute a reasonable exercise of the Secretary's authority.

OD argues, on the basis of the above quotation, that finding it to be an independent contractor and an "operator" within the meaning of section 3(d) would disregard the substance of its contacts with the mine operation and would exceed the congressional intent stated in the legislative history.

Finally, OD's brief (p. 13) cites National Independent Coal Operators Ass'n. v. Brennan, 372 F.Supp. 16 (D.C.D.C. 1974), aff'd, 419 U.S. 955, and claims that the court in that case struck down the Secretary's liberal interpretation of the word "operator" so as to include as "operators" under the Act construction companies not involved in the mining process. OD's brief (p. 14) thereafter summarizes its arguments above to the effect that contractors made subject to the Act should be engaged in construction at the mine, or involved in the extraction process, and have a continuing presence at the mine. OD contends that its activities fail to satisfy any of the criteria required for finding it to be an "operator" within the meaning of section 3(d).

When one reads the legislative history and court decisions on which OD relies in the preceding summary of its arguments, it is found that the decisions are all adverse to the arguments which OD makes. As for OD's claims that the legislative history shows that Congress did not intend for an electric power company to be found to be an "operator" under the Act, on the same page from Senate Report No. 95-181 from which OD lifted the quotation I have set forth above, the Committee also stated (Report No. 95-181, p. 14, or Legislative History, supra, p. 602):

* * * The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

* * * In enforcing this Act, the Secretary should be able to issue citations, notices, and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal court in Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F2d 240 (C.A.4, 1977).

Thus, before the 1977 Act even became effective, the courts had already held that independent contractors could be found to be "operators" within the meaning of section 3(d) before that section was specifically amended to include independent contractors as "operators". Moreover, the Fourth Circuit in the Bituminous Coal case referred to in the quotation above from Senate Report No. 95-181, the court stated that the Brennan case, supra, on which OD relies,

"* * * does not furnish persuasive authority for decision of the issues in this case" because the holding in Brennan was made with respect to whether independent contractors had to comply with the "black lung" provisions of Title IV of the Act rather than with the safety regulations which are involved in Titles II and III of the Act (547 F.2d at 245). Consequently, OD's reliance on the Brennan case is misplaced because that decision had nothing to do with whether the Secretary can cite an electrical company for violations of the mandatory safety standards when the electrical company is rendering services for a coal company on mine property.

In the BCOA case cited in Senate Report No. 98-181, the court referred to power lines as one of the facilities which independent contractors might construct on mine property and be found to be operators within the meaning of the Act (547 F.2d at 243). The court held that when a contractor sinks a shaft or places other equipment on mine property, it is performing work on facilities which are "to be used in" the work of extracting or processing coal (547 F.2d at 245). Moreover, the court stated that the "* * * fatality rate for contractors' employees is greater than that for the rest of the coal mining industry". Inasmuch as the Senate Report which OD cites in support of its claim that Congress did not intend for electrical companies to be cited as "operators" shows that the Committee was aware of the holdings of the court in the BCOA case, there is little merit to OD's claim that Congress could not have intended that electrical companies be cited as "operators" when they amended the definition of "operators" to include independent contractors which are "performing services or construction at such mine".

Also OD can take no comfort from the holding of the court in the Assn. of Bituminous Contractors case, supra, in which the court applied the principle of ejusdem generis and found that the term "operator", as used in section 3(d) would include independent contractors because they are similar in nature to "owners" and "lessees" because they supervise and control a "coal mine" as that term is defined in the Act (581 F.2d at 861). The part of the court's rationale which OD fails to consider is that the court did not hold that the independent contractor has to participate in the actual extraction of coal in order to be found to be an independent contractor and an "operator" within the meaning of the Act. The court interpreted the words "controls, or supervises a coal mine" in section 3(d) of the Act to include independent contractors who "control and supervise the construction work they have contracted to perform over the area where they are working" (581 F.2d at 862-863).[Emphasis in original.]

In this proceeding, OD's contract with Westmoreland required Westmoreland to provide OD with (Exh. B, page 2):

* * *the right, privilege and easement to construct, operate, use and maintain electric power and transmission lines for the transmission of electrical energy, and a telephone line for communication, together with all necessary towers, foundations, poles, wires, cables, guy wires, stay wires, braces and all other fixtures and appliances necessary or convenient for said purposes on and over the surface of all those five certain strips or parcels of land situate[d] in Wise and Lee Counties, Virginia ***

Under OD's rules and regulations on file with the Virginia Corporation Commission, OD is given (Exh. A):

* * * the right of access to the Customer's premises at all reasonable times for the purpose of installing, reading, inspecting or repairing any meters, devices and other equipment used in connection with its supply of electric service, or for the purpose of removing its property and for all other proper purposes.

In this proceeding, OD installed three current and two potential transformers and a meter at Westmoreland's substation. OD reserved its exclusive right to control, check, read, and repair those facilities at the substation. The substation was located on mine property leased by Westmoreland from Penn-Virginia Resources Corporation (Finding No. 5, supra). OD delivers power to Westmoreland at 20 different locations (Finding No. 4, supra). The evidence, therefore, clearly shows that OD has a contract to construct facilities on mine property and that those facilities are essential to the extraction of coal because cutting machines, continuous-mining machines, roof-bolting machines, conveyor belts, and other mining equipment will operate only when they are connected to a source of electrical power.

In the circumstances described above, the court's opinion in Assn. of Bituminous Contractors, supra, is applicable to OD, including the conclusion reached by the court at 581 F.2d 863:

* * * If a coal mine owner or lessee contracts with an independent construction company for certain work within a certain area involved in the mining operation, the supervision that such a company exercises over that separate project clearly brings it within the statute. Otherwise, the owner would be constantly interfering in the work of the construction company in order to minimize his own liability for damages. The Act does not require such an inefficient method of insuring compliance with mandatory safety regulations.

2. Are MSHA's Regulations defining "operators" arbitrary and capricious and an unconstitutional delegation of legislative authority?

OD's brief (pp. 14-20) attacks MSHA's regulations on the ground that MSHA abused its discretion in finding (45 Fed. Reg. 44494):

that it had broad discretion to define the respective compliance responsibilities of owners, lessees or other persons who operate, control or supervise mines [production-operators] and independent contractors working at mines.

OD also objects to MSHA's issuance in this proceeding of a citation based on MSHA's definition of an independent contractor which provides (30 C.F.R. § 45.2(c) and 45 Fed. Reg. 44496):

(c) "Independent contractor" means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine;

OD maintains that it has been improperly found to be an independent contractor in this proceeding because it does not come within MSHA's definition of an independent contractor. OD contends that it has no contract to perform

services at Westmoreland's mine other than the contracts introduced in this proceeding which require OD "* * * to furnish electrical power and to install meters to measure the quantity of electricity being used" (OD's Brief, p. 15). OD again states that its contract with Westmoreland required it to do nothing at the substation here involved that it would not do at any other substation for any other customer. OD argues that it does the same kind of work on farms and residential property that it did for Westmoreland and that it simply can't be found to be an "independent contractor" and an "operator" under the Act on the basis of the type of services and work done by it at Westmoreland's substation (OD's brief, p. 16).

OD continues its attack on MSHA's regulations pertaining to independent contractors by contending that it is an abuse of discretion for MSHA to make a rule which can be interpreted in a fashion which makes OD an independent contractor subject to the provisions of the Act. OD argues that MSHA's claim that it has "broad discretion to define the respective compliance responsibilities of * * * independent contractors" amounts to an unconstitutional delegation of legislative authority by Congress to an administrative agency (Brief, p. 18). OD contends that while "* * * Congress has authority to grant power to an administrative agency to prescribe rules and regulations, that authority does not include the power to make law, because no such power can be delegated by Congress (Brief, p. 18). OD cites Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975) and Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936), and other cases in support of the foregoing argument.

While it is true that the cases cited by OD do hold that Congress cannot delegate the power to make law to an administrative agency, I do not find from my review of the regulations pertaining to independent contractors that the Secretary of Labor or MSHA promulgated any rules which amounted to "making law". As MSHA's counsel points out in his brief (p. 8), section 508 of the Act authorizes the Secretary to "* * * issue such regulations as each [Secretary] deems appropriate to carry out any provision of this Act." MSHA issued regulations pertaining to independent contractors in conformance with all due process requirements of the Administrative Procedure Act (5 U.S.C. § 553). MSHA's brief (p. 8) shows that the rules were properly promulgated in the well-stated explanation quoted below:

Following the development of a draft proposed rule and the circulation of that draft for comment to interested parties, a notice announcing the availability of the draft proposal was published in the Federal Register on October 31, 1978 (43 FR 50716). As a result of comments concerning the draft proposal, changes in it were made prior to its publication in the Federal Register as a proposed rule on August 14, 1979 (44 FR 44746). A series of public hearings was announced on September 14, 1979 in the Federal Register (44 FR 54540), and the hearings were conducted between October 11 and October 30, 1979. After full consideration of all comments and testimony concerning the proposed rule, the final rule was published in the Federal Register on July 1, 1980 (45 FR 44494). The final rule became effective July 31, 1980.

One of OD's witnesses stated that OD would have commented on the proposed rules pertaining to independent contractors if OD had been given proper notice of the fact that they had been proposed (Tr. 75-76). I am adopting a paragraph from MSHA's brief as an appropriate reply to that contention (MSHA's brief, p. 9):

To this objection [lack of proper notice] MSHA responds that it is a well settled principle of law that the publication of regulations in the Federal Register gives legal notice of their contents to all who may be affected thereby. Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 384-385, 68 S.Ct. 1, 92 L.Ed. 10 1947); Wolfson v. United States, 492 F.2d 1386, 1392 (Ct.Cl. 1974); Federal Register Act of 1935, 44 U.S.C. §1507 (1978). Therefore, MSHA concludes that Old Dominion had legal notice of the publication of the final rule on independent contractors and that due process was observed.

MSHA certainly did not make law in promulgating the definition of an independent contractor which is set forth in the final rules. Comparison of MSHA's definition of an independent contractor with the definition of "operator" given in section 3(d) of the Act shows that MSHA merely paraphrased the definition of "operator". The legislative history which has been quoted in this decision and in OD's brief shows that Congress added independent contractors to the list of persons who could be cited by MSHA for violations of the mandatory health and safety standards. MSHA did nothing more than comply with the Act when it promulgated the independent-contractor regulations to which OD objects.

Regardless of whether one relies on the definition of "operator" in section 3(d) of the Act, or the definition of an independent contractor given in section 45.2(c) of the regulations, OD's activities at Westmoreland's substation were clearly sufficient to bring OD within the categories of "operator" and "independent contractor". The record shows that OD had a contract with Westmoreland under which OD reserved the exclusive right to install all facilities required to determine the amount of electrical energy supplied to Westmoreland for Elro Coal Corporation's No. 3 Mine. OD's employees installed the necessary metering facilities and had exclusive control over those facilities. OD's exclusive control over those facilities required it to determine whether to send employees out to the substation to check the metering facilities in response to Westmoreland's notification that the metering facilities were not working properly. The checking of the metering facilities by OD's employees resulted in the death of one of OD's employees through failure of that employee to comply with a mandatory safety standard.

Section 103(j) of the Act requires the operator of a coal mine to report all accidents to MSHA. Therefore, Westmoreland had to report to MSHA the fact that a fatal accident had occurred at its substation located on mine property. MSHA is required by section 103(j) of the Act and by section 50.11 of the regulations to investigate accidents occurring at coal mines. If a violation is found by MSHA's inspectors, they are required by the Act to issue citations or orders. In issuing those citations or orders, they must determine what entity is responsible for the occurrence of the violation. In this instance, the evidence clearly shows that the accident was caused by the failure of OD's employees to follow their own rules as well as the mandatory safety standards.

Since the regulations to which OD is objecting in this proceeding had not been finalized at the time of the accident on January 22, 1980, the inspector first issued the citation here involved to Elro Coal Corporation, and then to Westmoreland, and, finally, to OD because the rules pertaining to citing independent contractors for violations had been finalized between the time the accident occurred in January 1980 and the time the citation was issued to OD on January 21, 1981.

The final assault which OD's brief (p. 20) makes on MSHA's rules pertaining to independent contractors is that they do not take into consideration how remote from actual mining activities a company's work on mine property may be, or how short and infrequent a company's contacts with mine property may be. OD claims that the failure by MSHA to consider such elements is an arbitrary extension of the rules to all companies and is therefore an illegal and arbitrary extension of power. A reading of MSHA's explanatory discussions published in the Federal Register at the time the rules were finalized shows that MSHA had originally considered the very approach advocated by OD, but MSHA rejected that approach because the persons who commented on the proposed rules believed that such an approach would produce arbitrary results. MSHA's explanation, in pertinent part, was stated as follows (45 Fed. Reg. 44495):

* * * Commenters also objected to the consideration of "major work" and "continuing presence" as irrelevant and arbitrary.

The commenters' analysis of the concept that independent contractors are generally in the best position to prevent safety and health violations in the course of their own work, and to abate those violations that may occur, has persuaded MSHA that holding all independent contractors responsible for their violations will in the majority of instances improve the overall safety and health of miners. MSHA has concluded that a regulation that would distinguish some contractors from others in formulating a comprehensive enforcement scheme could, at this time, be overly complex, imprecise and lead to arbitrary decisions that would not promote the safety and health of miners. Therefore, MSHA believes that enforcement decisions should be made on the basis of the facts pertaining to each particular case, at least until MSHA gains more experience with independent contractors under the Act. Independent contractors and production-operators will have notice of their compliance responsibilities through this final rule and through enforcement guidelines which will be made available to all interested persons. * * *

As has been indicated above, OD had exclusive control over its facilities and employees and was in the best position to have prevented the fatal accident involved in this proceeding. Therefore, OD was the proper party to be cited for the violation. In short, OD has shown nothing about the rules pertaining to independent contractors which shows that they were arbitrarily issued or involve an unconstitutional delegation of legislative power to the Secretary of Labor or MSHA.

3. Is OSHA responsible for investigating the conduct cited by MSHA?

OD's brief (pp. 20-21) opens its claim that it should be subject only to OSHA's regulations with an argument that OSHA's and MSHA's regulations are

inconsistent and that OSHA's regulations are better designed to cover the facilities and services performed by electrical utilities than MSHA's regulations are. OD contends that MSHA's regulations would require its employees to be qualified mine electricians, or have at least 1 year of experience in performing electrical work in a mine and complete a coal-mine electrical training program approved by MSHA, or have 1 year of experience in mining activity and pass a series of 5 tests administered by the Secretary. OD cites section 77.103 of the regulations in support of the foregoing argument. The guidelines published in the Federal Register (45 Fed. Reg. 44498) at the time the final rules pertaining to independent contractors were issued suggests that MSHA's training program for independent contractors will be different from that required for employees of operators who are engaged in the actual extraction of coal from mining property. Therefore, I am not certain that OD's claims about the adversity of being subject to MSHA's regulations at mine sites is correct.

Assuming, arguendo, that OD would have to provide its employees with additional training before they are qualified to work at substations on mine property, the facts in this proceeding show that OD could well spend some additional time training its employees. For example, the evidence shows that two men went to check metering facilities at Westmoreland's substation on January 21, 1980. The one who was electrocuted was called a substation technician and the other one was called a meter man, first class. They had been told to find out why a light did not work in the meter and to determine whether the disk in the meter was supposed to turn counterclockwise. The supervisor who sent them to check the meter believed that the meter was supposed to turn counterclockwise. As it turned out, the meter which was installed did not have a light in it (Tr. 50) and the disk was properly turning in a counterclockwise direction (Finding Nos. 8-10, supra). The meter man, first class, had installed the meter on the day preceding the accident and should have known it did not have a light in it (Tr. 89). Yet, when the two employees arrived at the substation, the substation technician incorrectly concluded that the substation was deenergized and stated that he could not check the light in the meter unless electrical energy was flowing through it. The meter man, first class, did not remind the substation technician that the meter did not have a light in it to check, regardless of whether power was flowing in it or not.

Moreover, the substation technician first suggested that a ladder be placed across the fence of the substation against the pole on which the transformers had been installed. Even if the substation had not been energized, he would have violated OD's regulations as to the placement of ladders (Exh. H, Part I, Section 4), when he proposed that they check the nameplate on the transformers by placing a ladder across the fence around the substation in order to get close enough to the transformer to read the nameplate (Tr. 93). It was only because of a counterproposal by the meter man, first class, that the substation technician failed to carry out his proposed use of a ladder to check the nameplate. Although OD claims that the substation technician had missed only three of the quarterly training sessions given over a 10-year period, his hasty and ill-considered actions on January 22, 1980, show that OD's safety meetings were not making any impression on the work habits of the substation technician. Therefore, I find that OD's objections to having to comply with MSHA's regulations are not a valid reason for me to find that OD

should be considered to be exempt from MSHA's jurisdiction over work done by OD on mine property.

OD's brief (p. 22) next refers to the OSHA-MSHA Interagency Agreement which has been published in the Federal Register (44 Fed. Reg. 22827) and which was introduced in this proceeding as Exhibit J. That agreement provides some general principles which govern the classes of activity over which MSHA and OSHA will assert jurisdiction.

Most of the discussions in the agreement deal with questions of which activity are mining as opposed to milling since MSHA has jurisdiction over mining operations and OSHA generally has jurisdiction over milling activities. OD cites one sentence in the agreement as a basis for arguing that its activities at Westmoreland's substation should be subject to OSHA's jurisdiction. That sentence reads as follows (Exh. J, p. 1):

* * * Also, if an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSH Act may be applied to such an employer where the application of the OSH Act would, in such a case, provide a more effective remedy than citing as a mine operator or an independent contractor subject to the Mine Act who does not, in such circumstances, have direct control over the working conditions.

The sentence quoted above might be helpful to OD's position in this proceeding if I had not already shown in the preceding part of this decision that MSHA properly found OD to be an independent contractor which is subject to the Mine Act. OD did have direct control over the work it did at the substation and it was appropriate for MSHA to assert jurisdiction under the Mine Act.

OD's brief (p. 22) additionally argues that the Interagency Agreement makes clear that double regulation is not intended. Although employees of both OSHA and MSHA investigated the fatal accident at Westmoreland's substation, OSHA did not cite any violations and made no contention that it had exclusive jurisdiction to investigate the accident. The Interagency Agreement comes into play only if MSHA and OSHA cannot agree at the local level as to which agency has jurisdiction. OD is correct in pointing out that no formal assignment of jurisdiction as between OSHA and MSHA was agreed upon with respect to the accident which occurred at the substation (OD's brief, p. 23). The accident involved in this proceeding seems to have been the first occasion which required the two agencies to determine which had jurisdiction over the activities of an electrical utility at substations on mine property. The Interagency Agreement shows that the primary basis for determining jurisdiction as between MSHA and OSHA depends upon which activities occur on mine property as opposed to milling or manufacturing operations which occur off of mine property. It is clear under the Interagency Agreement that a given company may be subject to the jurisdiction of both OSHA and MSHA because the Interagency Agreement has a discussion on page 3 pertaining to the determination of the place at which MSHA's jurisdiction ends and OSHA's jurisdiction begins. The outcome of this case will apply in future cases in determining where MSHA's jurisdiction over electric utilities ends and OSHA's begins. It is obvious that any of OD's activities on mine property should henceforth be subject to

MSHA's jurisdiction while OD's activities off of mine property will be subject to OSHA's jurisdiction.

MSHA's brief (pp. 13-17) contains an excellent discussion of why MSHA's jurisdiction was appropriately and properly exercised with respect to the accident which occurred at Westmoreland's substation. One paragraph is especially pertinent and is quoted below (MSHA's brief, pp. 14-15):

In ruling on the extent as well as the limitations of OSHA jurisdiction under paragraph 4(b)(1) [of the 1970 Occupational Safety and Health Act], the United States Court of Appeals for the Fourth Circuit held that exemption from the Occupational Safety and Health Act applies only when another Federal agency has actually exercised its statutory authority to regulate employee safety. The court stated that when the facts show that a Federal agency has not exercised its statutory authority to regulate employee safety, the OSHA Act applies, but where the Federal agency has exercised its statutory authority to prescribe standards affecting safety or health in the area in which the employee goes about his daily tasks, the authority of OSHA is foreclosed. Southern Railway Company v. Occupational Safety and Health Review Commission, 539 F.2d 335 (1976). Since the issue in this case is an alleged violation on coal mine property of a mandatory safety standard of the Mine Safety and Health Act, the inescapable conclusion must be that OSHA jurisdiction is, as the court has stated, foreclosed.

On the basis of the foregoing discussion, I find that OSHA was not responsible for investigating the conduct of OD's employees at the substation on January 22, 1980, and that the violation found by MSHA's inspector was properly cited under the Mine Act and the regulations promulgated thereunder.

4. Is a 1-year delay in issuing a citation "reasonable promptness" as required by the Act?

OD's brief (p. 23) contends that the citation in this case was not issued to OD with "reasonable promptness" as required by section 104(a) of the Act which provides, in pertinent part, as follows:

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. * * * The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

OD states that the OSH Act prohibits the issuance of a citation after the expiration of 6 months following the occurrence of any violation. OD's brief (p. 24) also correctly states that the inspector who wrote the citation here involved did not know of any other instance in which there was a delay of more than 6 months between the occurrence of a violation and the writing of a citation. OD's brief (p. 23) states that the legislative history does not show why Congress failed to set a specific time limitation on the issuance

of citations under the Mine Act. MSHA's brief (p. 12), on the other hand, cites some legislative history from Senate Report No. 95-181 which appears to show exactly why Congress failed to specify an exact period of time. That explanation is quoted below (Report No. 95-181, p. 30, or page 618 of Legislative History):

* * * There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons. For this reason, Section [104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. * * *

As indicated in Finding No. 14, supra, MSHA's inspector determined very shortly after investigating the fatal accident that a violation of section 77.704 had occurred. He first issued the violation in the name of Elro Coal Corporation, then in the name of Westmoreland, and finally in the name of OD. Therefore, no delay occurred in the determination that a violation had occurred. The delay arose because of the complexity of the law with respect to whether MSHA should cite only a production operator for the violations of independent contractors working on mine property. The inspector first cited the production operators because the law was in a state of confusion as to whether only the production operator (Westmoreland) or the independent contractor, or both, should be cited for violations caused by activities of independent contractors working on mine property.

The Commission first considered the question of whether an operator can be cited for violations by independent contractors in Republic Steel Corp., 1 FMSHRC 5 (1979). In that case, the Commission reversed an administrative law judge's decision in which the judge had held that the independent contractor was liable for the violation there involved. The Commission held that an operator can be cited for the independent contractor's violation even if only the independent contractor's employees are in the area where work is being performed. In footnote 13 at 1 FMSHRC 11, the Commission majority explained, however, that it was not holding that only the operator is liable because it believed that both the independent contractor and the operator could be held to be liable and that both could be cited in a separate or a consolidated proceeding.

The Commission's Republic decision followed the Fourth Circuit's decision in Bituminous Coal Operators Assn. v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1979), already cited above, in which that court held that construction companies are subject to the Act because they work on a facility which is to be used in the work of extracting coal. The court said that construction companies are subject to the Act and must observe the health and safety standards promulgated under the Act. The court held, before the 1969 Act was specifically amended to include independent contractors as "operators," that construction companies can be "operators" because they control and supervise work at coal mines. The court said that when they sink a shaft or build a tippie, they are controlling a mine because the facility will be used to extract coal. The court also held that a construction company can be found to be an "operator" before any coal has begun to be extracted from the mine

and can be found to be an "operator" if they are working on only a part of a mine. Finally, the court held that the Secretary of Interior could issue notices of violations and orders to construction companies and could assess and collect penalties from them. The court stated that it was up to the Secretary in each case to decide whether the production operator or the construction company, or both, were liable and which or both should be cited.

In Association of Bituminous Contractors, Inc. v. Cecil D. Andrus, 581 F.2d 853 (1978), also previously cited above, the D.C. Circuit made holdings similar to those stated by the Fourth Circuit in the BCOA case, supra.

In Cowin and Company, Inc., 1 FMSHRC 20 (1979), the Commission affirmed a judge's decision finding that an independent contractor should be cited for a violation under the 1969 Act. The former Board of Mine Operations Appeals had reversed the judge on the basis of Order No. 2977 which had been issued by the Secretary of Interior requiring that only the production operator could be cited for violations by the independent contractor. In Kaiser Steel Corp., 1 FMSHRC 343 (1979), the Commission majority held that the production operator could be cited for a violation committed by an independent contractor named Boyles Brothers. In Consolidation Coal Co., 1 FMSHRC 347 (1979), the Commission majority also upheld the citing of a production operator for an independent contractor's violations. The Commission made a similar holding in Monterey Coal Co., 1 FMSHRC 1781 (1979).

In Old Ben Coal Co., 1 FMSHRC 1480 (1979), the Commission also upheld the citing of a production operator for the independent contractor's violation, but the Commission noted that the citation in that case had been written in April 1978 shortly after the 1977 Act became effective. Since the 1977 Act specifically provided for independent contractors to be cited as "operators", the Commission said that if, in future cases, it should find that the Secretary of Labor was citing operators purely for administrative convenience, it would not approve such procedures.

The most recent action taken by the Commission with respect to citing independent contractors, as opposed to production operators, or both, was in Pittsburgh & Midway Coal Mining Co., 2 FMSHRC 2042 (1980), in which the Commission remanded a case to an administrative law judge so that the Secretary of Labor could apply the procedures for citing independent contractors for violations as those procedures were set forth in Volume 45 of the Federal Register at pages 44,494 to 44,498. The Commission indicated in its decision that the Secretary was free to proceed against either the independent contractor or the production operator, or both. The Commission has issued similar orders in at least two other proceedings, remanding the cases for the purpose of allowing the Secretary to apply the rules pertaining to citing independent contractors for violations of the mandatory safety standards (C and K Coal Co., 2 FMSHRC 2047 (1980), and Phillips Uranium Corp., 2 FMSHRC 2050 (1980)).

My review of the cases involving the issue of whether the Secretary or MSHA should cite the production operator or the independent contractor, or both, for violations occurring at mine sites shows that MSHA was proceeding under a series of legal decisions and that a considerable time elapsed before a consistent policy finally was achieved. In such circumstances, I find that complexities existed in applying the Act which justified the fact that the violation in this instance occurred on January 22, 1980, and was not

charged in a citation issued to OD until January 21, 1981, or 1 day less than a year after its occurrence.

In Salt Lake County Road Department, 3 FMSHRC 1714 (1981), the Commission affirmed a judge's decision which had denied a motion to dismiss a Proposal for Assessment of Civil Penalty which had not been filed within 45 days as provided for by section 2700.27 of the Commission's rules. The Commission stated that section 105(d) of the Act provides that the Secretary is to notify the Commission "immediately" after a notice of contest is filed. The Commission stated that it had implemented the word "immediately" in the Act by using a time period of 45 days in the rules. The Commission stated, however, that the legislative history showed that although Congress wanted prompt notification in order to promote fairness, Congress did not want a penalty case to be vitiated simply because the notification happened, in a rare instance, to be somewhat less than prompt. The Commission also stated that it was appropriate to determine whether the late filing of the Proposal for Assessment of Civil Penalty was prejudicial to the respondent in that case and the Commission held that no prejudice had resulted in that instance.

The evidence in this proceeding shows that no prejudice to OD resulted because of the fact that OD was not specifically cited for a period of 1 year. OD had participated in the thorough investigation which MSHA made into the cause of the accident and MSHA personnel came to OD's office and discussed the fact that MSHA was considering the question of finding OD to be an operator under the 1977 Act pursuant to the new rules which MSHA had promulgated with respect to independent contractors (Tr. 75-78). OD filed a notice of contest of the citation after it was issued and OD has been provided with a hearing and with the opportunity to file a brief in support of its position. Therefore, the fact that the citation was not issued to OD for a year after the violation occurred has not been prejudicial to OD.

(5) Is any civil penalty justified?

OD's brief (p. 24) contends that even if it should be determined that OD is subject to MSHA's jurisdiction, it would be totally inappropriate to assess any civil penalty whatsoever because the accident occurred through no fault of OD. OD notes that the inspector's statement evaluating negligence showed that the inspector did not believe that OD could have known or predicted that the accident would occur and that its occurrence was beyond OD's control. OD argues that the electric utility industry is very safety conscious and that OD has a thorough safety program. OD emphasizes that the employee who was electrocuted was told before he went to the substation that it was energized and that he violated a well-known company rule with which he was very familiar (Finding Nos. 12 and 15, supra). In such circumstances, OD contends that assessment of a penalty would serve no useful purpose.

Even OD's witnesses agreed that a violation of the company's safety rules had occurred (Tr. 64; 96). One of the rules violated was Paragraph 31-1 in Part III of OD's Safety Manual (Exh. H) and it requires that electrical lines be grounded before work on them is done. Citation No. 688762-1 issued by the inspector cited OD for a violation of section 77.704 which provides, in pertinent part, that "[h]igh-voltage lines shall be deenergized and grounded before

work is performed on them, except that repairs may be permitted on energized high-voltage lines if * * * certain safeguards are followed. The inspector testified that work can be done on energized lines only under certain conditions and that one of the conditions is that the weather be satisfactory. Inasmuch as it was rainy and foggy on the day of the accident, the inspector said that no work could have been done on the energized high-voltage lines under the weather conditions prevailing on the day of the accident without violating the provisions of section 77.704. Since section 77.704 essentially provides that energized lines be deenergized or grounded and since OD's witnesses agreed that no attempt had been made by either of OD's employees to ground the lines before they worked on them, all the evidence in the record supports a finding that a violation of section 77.704 occurred, and I so find.

Having found that a violation occurred, it is mandatory under the Act that a civil penalty be assessed. The Commission has held in several cases that liability of an operator for violations of the mandatory safety standards is not conditioned upon fault (U. S. Steel Corp., 1 FMSHRC 1306 (1979); Peabody Coal Co., 1 FMSHRC 1494 (1979); and Ace Drilling, Inc., 2 FMSHRC 790 (1980)). The Commission has also held that if a citation or order alleges a violation and one is found to have occurred, a judge may not dismiss the penalty proceeding without assessing a penalty even if a motion to dismiss is filed by counsel for MSHA (Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)). Therefore, it is well settled that I may not dismiss the Petition for Assessment of Civil Penalty filed in Docket No. VA 81-65 seeking assessment of a civil penalty for the violation of section 77.704 involved in this proceeding and that I must assess a civil penalty based on the six criteria set forth in section 110(i) of the Act (Tazco, Inc., 3 FMSHRC 1895(1981)).

In connection with the assessment of a civil penalty, it should be noted that a judge is not bound by the assessment procedures which are employed by the Assessment Office in proposing civil penalties (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U.S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); and Co-Op Mining Co., 2 FMSHRC 784 (1980)). Therefore, my decision with respect to the civil penalty issues is being made on the basis of the evidence presented in this proceeding without regard to the size of any penalty which may have been proposed by the Assessment Office in Docket No. VA 81-65.

Consideration of the Six Criteria

1. Size of OD's Business

As to the criterion of the size of OD's business, I have already indicated in Finding No. 1, supra, that OD is a subsidiary of Kentucky Utilities Company, that it employs 80 persons, and that its annual revenues from the sale of electricity amount to about \$24,000,000 per year. On the basis of those facts, I find that OD is a large operator and, to the extent that the penalty is based on the criterion of the size of respondent's business, the penalty should be in an upper range of magnitude.

2. Effect of Penalties on OD's Ability To Continue in Business

OD's counsel did not introduce any evidence pertaining to OD's financial condition. The former Board of Mine Operations Appeals held in Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), that if an operator fails to present any evidence in a civil penalty case pertaining to the operator's financial condition, that a judge may assume that payment of penalties would not have an adverse effect on the operator's ability to continue in business. Therefore, in the absence of any evidence in this proceeding which would support a contrary conclusion, I find that payment of civil penalties will not cause OD to discontinue in business.

3. History of previous violations

As to the criterion of OD's history of previous violations, both the inspector who wrote the citation and MSHA's counsel stated that there is nothing in MSHA's files which show that OD has previously been cited for a violation of the mandatory health and safety standards (Tr. 140). Therefore, the penalty to be assessed in this proceeding will neither be increased nor reduced under OD's history of previous violations.

4. OD's good-faith effort to achieve rapid compliance

The inspector testified that OD reinstructed its employees with respect to the procedures which should be used prior to working on electrical equipment (Finding No. 15, supra). Therefore, I find that OD made a good-faith effort to achieve rapid compliance after being cited for the violation of section 77.704 and that mitigating factor will be taken into consideration in determining the size of the penalty.

5. Degree of Negligence

As indicated in Finding No. 13, supra, the violation of section 77.704 occurred because two of OD's employees went to Westmoreland's high-voltage substation and attempted to check OD's metering equipment without making a careful examination to determine whether the substation was energized and without grounding the lines going into the metering facilities. Section 77.704 requires that high-voltage lines be deenergized and grounded before work is done on them. Although work can be done on energized high-voltage equipment, it would have been a violation of section 77.704-2(4) for the employees to have worked on the energized equipment in this instance because the weather was rainy and foggy.

Two of OD's witnesses, including the employee who survived the encounter with high-voltage equipment, testified that no attempt had been made to ground the equipment before an effort was made to read the nameplate on the transformer. Both of OD's witnesses agreed that they had violated OD's own safety regulations, particularly paragraph 31-1, Part III, of OD's Safety Manual (Finding No. 12, supra). The inspector's statement also shows that he did not consider OD to have been negligent since he checked the portion of the form used by inspectors for evaluating negligence which states that the failure of the two employees to follow the provisions of section 77.704 "could not have been known or predicted, or occurred due to circumstances beyond the operator's control". Under the "Remarks" portion of the inspector's statement,

the inspector made the following entry: "The employees were told the substation was energized before they left their duty station" (Exh. 3).

MSHA's brief (p. 20) states that "* * * the failure to follow basic safety rules under the Act and under company regulations would indicate at least ordinary negligence on the part of the operator." MSHA's brief, however, does not cite any testimony to show why the company's management should be held to be negligent for failure of experienced employees to follow basic safety rules or the almost identical provisions of section 77.704. In Nacco Mining Co., 3 FMSHRC 848 (1981), the Commission found that the operator was nonnegligent for a violation of section 75.200 in circumstances which showed that a foreman had gone out from under roof support for a distance of 10 to 12 feet in violation of the operator's roof-control plan. The foreman was killed when the roof fell on him. The facts showed that the foreman had received proper training and that he had shown good judgment on prior occasions with respect to following safety regulations, but on the day of the accident, he acted aberrantly and engaged in conduct which was wholly unforeseen. The foreman's action did not expose anyone else to harm or risk. The Commission stated that finding an operator negligent in such circumstances would discourage pursuit of a high standard of care because regardless of what an operator did to insure safety, a finding of negligence would always result.

The evidence in this proceeding shows that OD's management was not as free from fault as the evidence indicated in the Nacco case cited above. As I have already pointed out in this decision in my discussion of the issue of whether accidents on mine property are subject to MSHA's jurisdiction as opposed to OSHA's jurisdiction, OD's superintendent of meters sent two employees on January 22, 1980, to check a meter which he believed was working properly. One of the employees who was sent to the mine had originally installed the meter. The other employee had replaced the meter on January 21, the day before the two employees were sent back to the substation to check the meters. The employee who replaced the meter was a meter man, first class. Westmoreland had only suggested to OD's superintendent of meters that the meter at the substation might be defective because no light was burning in the meter and because its disk was turning counterclockwise (Tr. 99). OD's general manager testified that the type of meter which had been installed did not have a light in it. The superintendent of meters had already told Westmoreland's employee that he thought the meter's disk was supposed to turn counterclockwise. Therefore, the evidence shows that nothing was wrong with the meter which required any checking to be done. Since the meter had no light, no light could have been seen by Westmoreland's employee. The meter's disk was supposed to turn counterclockwise. The fact that the superintendent of meters did not have a discussion with his employees in sufficient detail for them to realize there was no need to check the meters is strong support for a finding that management failed to advise the two employees as to the duties they were expected to perform at the substation.

Unless the employees' supervisor was remiss in his duties of providing the employees with specific information, there is no possible explanation for the meter man, first class, who had installed the meter on the previous day, to have testified that they could not check the light in the meter because the employee who was electrocuted had mistakenly concluded that no electricity

was flowing through the substation. It appears to me that the employees were sent to the substation with indefinite instructions and that management was negligent in providing them with exact information and instructions concerning the work which was required to be done at the substation.

There is also reason to believe that management knew, or should have known, that the employee who was electrocuted had a proclivity for cutting corners with respect to obeying safety precautions. For example, he proposed to check the nameplate on a transformer by leaning a ladder across the fence around the substation against the crossbar on which the high-voltage transformer was located for the purpose of climbing the ladder in order to read the nameplate on the transformer. He proposed to check the nameplate in that fashion to avoid opening the gate to the substation by knocking from the gate a piece of 2 by 4 which had been nailed on the gate to keep it from coming open for easy access by an animal or person who might have gone inside the substation where the danger of electrocution existed.

For the reasons given above, I do not believe that the circumstances showing no fault by management existed in this proceeding to the extent that it did in the Nacco case. I am required to consider the evidence as a whole in making my findings. Therefore, despite the fact that the witnesses professed to believe that OD's management was free of negligence and could not have foreseen the occurrence of the accident, I believe that OD's management failed to give the employees proper instructions before they were sent to the substation and I believe that the actions of the deceased employee at the substation show that he was in the habit of disobeying safety regulations. In the Nacco case, the evidence showed that the foreman who was killed had a history of following safety procedures and that he acted aberrantly on the day he was killed. The evidence in this proceeding shows that the employee who was killed had a history of acting in violation of safety regulations because he violated at least three of the company's own regulations before he was electrocuted. Specifically, he first failed to make a careful visual examination of the disconnects which were clearly visible as shown in a photograph taken during a snow storm on the day following the accident. The wires are easily visible in the photograph even though the photograph was taken from the place where the deceased employee would probably have been standing when he carelessly decided that the substation was deenergized. It is unlikely that the rain or fog prevented him from being able to see the wires on the disconnects, but if he could not see the wires clearly, that was all the more reason for him to have gone inside the substation so as to assure himself that the wires were not there. The mere fact that he was used to seeing a type of disconnect having wires inside a 1-inch tube did not excuse him from making certain that no type of wire was actually running between the upper and lower holders on the disconnects (Finding Nos. 8-10, supra).

The second violation of the safety precautions was that the deceased employee failed to ground the conductors before trying to read the information on the transformer's nameplate (Tr. 64-65; 96).

The third violation was not carried out because the deceased employee only proposed to place a ladder in an unsafe position in violation of OD's safety regulations for use of ladders (Exh. H, Part I, Section 4). The violation was not carried out because the meter man, first class, who had

accompanied the deceased employee, suggested that they go inside the substation and climb the pole on which the transformer had been installed in order to read the nameplate (Tr. 93).

Based upon my review of the entire record, I find that the violation of section 77.704 was associated with a moderate degree of ordinary negligence.

6. Degree of Gravity

MSHA's brief (p. 20) states that the violation must necessarily be considered to have been serious because the violation resulted in the electrocution of one of OD's employees. The evidence shows that the substation's purpose was to reduce voltage from 12,470 to a volatage which was needed to operate mining equipment. It would be difficult to find a violation which has more obvious potential for causing electrocution than failure to ground wires which may be transmitting 12,470 volts. Therefore, I find that the violation was extremely serious.

It should also be noted that the deceased employee's failure to make a proper visual examination as to the substation's energized status influenced the other employee who had accompanied him to the substation to assume also that the substation had been deenergized. Thus, the deceased employee's violation of section 77.704 exposed another employee to possible electrocution along with himself. Westmoreland could also have had employees working at the substation. Since one would ordinarily be inclined to rely on the supposed expertise of an employee of an electrical utility company, the violation would have been likely to have exposed any people in the vicinity of the substation to possible electrocution because they would have assumed that OD's employees would not have performed work at the substation without making certain that the substation had been deenergized.

Based on the findings above to the effect that a large operator is involved, that there was a good-faith effort to achieve rapid compliance, that payment of penalties will not cause OD to discontinue in business, that there is no history of previous violations, that there was ordinary negligence, and that the violation was extremely serious, I find that a civil penalty of \$3,000 should be assessed.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed in Docket No. VA 81-40-R is denied because Old Dominion Power Company is an independent contractor and operator within the meaning of section 3(d) of the Federal Mine Safety and Health Act of 1977 and was cited by MSHA for a violation under regulations properly promulgated for citing independent contractors for violations occurring on mine property.

(B) Citation No. 668762-1 dated January 21, 1981, is affirmed.

(C) The Petition for Assessment of Civil Penalty filed in Docket No. VA 81-65 is granted and Old Dominion Power Company, within 30 days from the date of this decision, shall pay a civil penalty of \$3,000 for the violation

of section 77.704 which was violated by Old Dominion as alleged in Citation No. 688762-1 issued January 19, 1981, as modified January 21, 1981.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

NOV 30 1981

UNITED MINE WORKERS OF AMERICA, : Complaint of Discharge,
: Discrimination, or Interference
On behalf of GARY L. SHREVE, :
Complainant : Docket No. WEVA 81-378-D
v. :
: McElroy Mine
CONSOLIDATION COAL COMPANY, :
Respondent

DECISION

Appearances: Mary Lu Jordan, Esq., Washington, D.C., for Complainant;
Daniel L. Fassio, Esq., Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Melick

This case is before me upon the complaint of the United Mine Workers of America (Union) on behalf of Gary L. Shreve under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that the Consolidation Coal Company (Consolidation) discriminated against and interfered with Mr. Shreve in violation of section 105(c)(1) of the Act. 1/ Seven specific protected activities and eight acts of discrimination and interference ranging in time from December 7, 1979, to March 7, 1981, are alleged. Complainant seeks costs, expenses (including attorney's fees) and a general order requiring Consolidation to cease and desist from purportedly threatening to transfer or discharge employees who report unsafe or unhealthy conditions and who refuse to perform work in unsafe or unhealthy conditions.

1/ Section 105(c)(1) of the Act provides in part as follows:

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners * * * in any coal * * * mine subject to this Act because such miner, [or] representative of miners * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal * * * mine * * * or because of the exercise by such miner, [or] representative of miners * * * on behalf of himself or others of any statutory right afforded by this Act."

Prehearing Motions

Consolidation argued in dismissal motions that the complaint should have been dismissed as to those alleged discriminatory acts that did not occur within 60 days before the Union complaint was filed with the Secretary, citing sections 105(c)(2) and 105(c)(3) of the Act as authority. ^{2/} It is undisputed that the Union complaint in this case was initially filed with the Secretary on November 21, 1980, and that the Union was subsequently notified of the Secretary's determination that no violation of section 105(c) had occurred. Six acts of discrimination and interference were cited in that complaint only two of which were alleged to have occurred within 60 days before that complaint was filed with the Secretary, i.e., the acts alleged to have occurred on November 10 and 12, 1980. The remaining acts were alleged to have occurred on December 7, 1979, February 23, 1980, March 4, 1980, and "sometime in 1980."

While the Union had initially claimed that the four earlier discriminatory acts should each have been considered on its own merits as an independent complaint under section 105(c)(3) of the Act, it has apparently withdrawn from that position. As clarified in its posthearing brief, the Union position now is that evidence of the earlier acts should be considered only as evidence of a pattern of conduct leading up to the alleged discriminatory acts on November 10 and 12, 1980. To the extent that evidence of prior acts of discrimination could be used to demonstrate that the conduct of the individual allegedly acting in a discriminatory manner on November 10 and 12, 1980, was in conformity with those previous acts as a habit or practice, I found such evidence to be relevant and admissible at hearing. Commission Rule 60(a), 29 C.F.R. § 2700.60(a). See also, Rule 406, Federal Rules of Evidence. I see no reason to reconsider that ruling at this time. In light of the position of the Union in its brief, the question of whether those earlier acts could also support independent actions before the Commission under section 105 of the Act is no longer before me.

2/ Section 105(c)(2) provides in part as follows:

"Any miner * * * or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

Section 105(c)(3) provides in part that:

"Within 30 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner * * * or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1)."

Consolidation further argued in its motion for partial dismissal that the complaint herein should have been dismissed as to the discriminatory acts alleged to have occurred subsequent to the filing of its complaint with the Secretary. For the reasons that follow, I conclude that I cannot consider the merits of those alleged acts either as independent complaints under section 105 of the Act or as relevant evidence in support of the alleged incidents on November 10 and 12, 1980, which preceded those alleged acts. Under section 105(c)(3), the right of a miner or representative of miners to file an action before the Commission on his own behalf arises only after the Secretary determines that no violation of section 105(c) has occurred. See footnote 2, supra. I am bound to give operative effect to the plain meaning of that statutory requirement. United States v. Menasche, 348 U.S. 528, 99 L.Ed 615, 75 S. Ct. 513 (1955). Accordingly, I do not have authority to consider in this proceeding as a substantive matter any discriminatory acts alleged to have occurred subsequent to the filing of the complaint with the Secretary and which therefore had not been considered by the Secretary. Respondent's motion for partial dismissal is therefore granted with respect to the discriminatory acts alleged to have occurred on February 17, 1981, and March 7, 1981.

Consolidation further argued that any evidence relating to those alleged acts of discrimination on February 17, 1981, and March 7, 1981, was inadmissible for any purpose in this proceeding. While arguably such evidence of subsequent conduct might be admissible to show the habit or routine practice of an individual thereby being relevant to proving that the conduct of that individual on the particular occasion at issue was in conformity with that habit or routine practice, Commission Rule 60(a), supra; Rule 406, Federal Rules of Evidence; the proffered evidence in this case is clearly so collateral to the principal issues that I find it to be irrelevant. Since the alleged violators of Mr. Shreve's rights on February 17 and March 7, 1981, were persons not even alleged to have been involved in any of the preceding discriminatory acts, their behavior on these occasions could hardly be considered evidence of habits or routine practices of any of the other individuals cited for the previous discriminatory acts. ^{3/} The proffered evidence is not therefore admissible. Commission Rule 60(a), supra.

I also observe that the Union failed to inform Consolidation of these alleged subsequent discriminatory acts until the day of hearing. This constituted a violation of the prehearing order issued by the undersigned on June 24, 1981. In order to refute these new allegations of discrimination, it appears that Respondent would have been required to call the five witnesses alleged to have participated in, or been present during, the alleged acts. Four of those witnesses were located too far from the hearing site to appear on the scheduled

^{3/} While the evidence could have arguably supported a contention that the alleged discriminatory acts of Consolidation personnel other than Aloia showed a conspiracy or pattern of discrimination by the company, the Complainant failed to proffer evidence to demonstrate that these acts were other than the isolated independent acts of the named individuals.

day of hearing. In addition, at least one of the witnesses was committed to testify on the following day as an essential witness in an out-of-state trial. Thus, on the one hand, it would have been unfairly prejudicial to the Respondent to have allowed the proffered evidence without providing it an opportunity to rebut that evidence and, on the other hand, it would have caused undue delay and expense to have continued the hearing for an additional 2 days to provide Respondent an opportunity to call the essential witnesses on its behalf. Moreover, even the Complainant conceded that it did not wish to have the proceedings continued. Under the circumstances, even assuming, arguendo, that the proffered evidence was relevant, it was an appropriate sanction for noncompliance with the prehearing order to have excluded that evidence. Evidence regarding alleged discriminatory acts on February 17, 1981, and March 7, 1981, is therefore given no consideration in this case.

Summary of the Evidence

The Principal Complaints - November 10 and 12, 1980: These complaints center on two conversations, one on November 10, 1980, between union safety committeeman Richard Lipinski and Gary Shreve's foreman, Albert Aloia, and the other on November 12, 1980, between Gary Shreve and Albert Aloia. At the time of the conversations, Albert Aloia, a recent mine engineering graduate, had been working at the McElroy Mine for only 2 years and had been a section foreman for less than a year. According to Aloia, on Friday, November 7, a company official informed him that an alleged "hotline" safety complaint had been made to the Federal Mine Safety and Health Administration (MSHA) regarding the scoop car under Aloia's control. He was informed that the complaint concerned unsecured lids for the scoop car batteries. Aloia was "disgusted" about the complaint because he thought he had already corrected the problem. It appeared that in spite of his corrective actions and without reporting any problem to him someone on the safety committee had reported the complaint to MSHA. He suspected that his scoop car operator, Gary Shreve, had initiated the complaint. It had been Shreve's past practice to bypass him in complaining of equipment defects.

On the following Monday (November 10), Aloia had occasion to talk with Union Safety Committeeman Lipinski. Aloia confided in Lipinski because he felt they "understood each other" and had a "fairly good relationship." Aloia's testimony about the conversation is as follows:

Q. [Attorney for Consolidation] And did you ask him what was wrong with the method that you had remedied [sic]?

A. [Aloia] In a general sense I did. I stated that I didn't think there would be anything wrong with it.

Q. What did he say?

A. He didn't say much during the whole conversation.

Q. Did he say that it was okay, as far as he was concerned?

A. I don't think he stated that?

Q. He didn't state that?

A. No.

Q. Do you recall him stating anything about the method about which the lids had been secured?

A. I do not recollect him stating anything.

Q. Did you discuss Mr. Gary Shreve at all during this time when you were inspecting the lids on the scoop car?

A. Yes.

Q. And how did his name come up in the conversation?

A. It is what we were talking about before, he was the operator and if there was a problem I felt he should have come and tell me about [sic]. And that's basically what I was telling Lipinski.

JUDGE MELICK: What was the full conversation that occurred regarding Mr. Shreve, on this day with Mr. Lipinski?

THE WITNESS: I told Lipinski that if there was a problem here that the problem should come to me first. It seemed like lately all the problems that were going on the safety committee were going around me and I'd be getting it second hand, and that didn't seem right. That wasn't the way it was supposed to work.

JUDGE MELICK: What did that have to do with Mr. Shreve?

THE WITNESS: In what sense?

JUDGE MELICK: Well, the question I asked, the information I want is the full extent of the conversation between you and Lipinski concerning Mr. Shreve.

THE WITNESS: I also said in that conversation that it seemed like we've had a numerous number of problems with that scoop and maybe Gary couldn't handle the job because of all the problems.

JUDGE MELICK: Did you suggest anything else?

THE WITNESS: No, sir.

JUDGE MELICK: Did you suggest that perhaps he would be better at another job.

THE WITNESS: No, sir.

JUDGE MELICK: Is that the extent of your conversation concerning Mr. Shreve?

THE WITNESS: Yes, sir.

JUDGE MELICK: All right.

Q. (By Mr. Fassio) Did you tell Mr. Lipinski that you were going to have Gary Shreve taken off the scoop car?

A. No, sir.

Q. Did you tell Rick Lipinski that there was always something wrong with the scoop car?

A. I told Mr. Lipinski that there was a numerous amount of problems with the scoop car.

Q. Did you tell him that it was always one thing after another and it always needs fixing?

A. No, I don't believe, I said that. I said that there was a numerous amount of problems.

Q. Did you state to him you can see why other foremen do not want to work with Gary Shreve?

A. No, I don't think I said that.

JUDGE MELICK: You could have said it?

THE WITNESS: No, I did not say that.

JUDGE MELICK: Did you say anything that might be interpreted as coming out that way?

THE WITNESS: I said that I thought that maybe Gary could not handle the job.

(Tr. 306-309).

Union safety committeeman Richard Lipinski also testified concerning that conversation. The relevant testimony appears as follows:

[Lipinski]

* * * I could tell he was kind of-- he was kind of upset and he was kind of disgusted. He says, I'm going to have Gary Shreve taken off the scoop car, you know, he says, he keeps on-- everytime he runs it, there's something wrong with the scoop car. And he said, I'm just tired of it, and he said I've tried to work with Gary on getting things fixed on the scoop car, but it's always one thing after another and, you know, like it seems like all the time there's something that needs fixing on the scoop. And that he could see why none of the other foremen really liked working with Gary.

I told Albert, I says, you know, you're really upset. The way I'm saying it now, I'm saying, you know, just in my own tone voice [sic], but you know, he was very upset and I told him there's no sense getting this upset Albert, you know.

And he says, no, he says, the hotline was called on my scoop and I'm really pissed off about it. He said, that when Gary runs the scoop car, you know, there's always something that comes up, but with someone else on the scoop car when Gary's off or on vacation and they don't seem to have any problems.

And I says, you know, that really doesn't really, you know, sound like him. And he said, well, come on up and I'll show you what, you know, what it is all about.

I went on up and he showed me where they had welded some additional supports on, to hold the lids on better. I told Albert then, I said, that to me this isn't an upsetting manner-- matter, that, you know, what they done was a perfectly, you know, correct thing to do to support the lids on better and I can't see you being so upset over this.

And that was-- right then, we kind of ended the conversation * * *.

(Tr. 188-189).

Lipinski reported the conversation he had with Aloia to Gary Shreve on Wednesday, November 12, 1980. Shreve's testimony in this regard is as follows:

Q. [Counsel for Union] And can you tell us what Mr. Lipinski said?

A. [Gary Shreve] Yes, he said that Albert had stated to him that he was going to remove me from my job. He'd had enough and it was-- there was some foul words said, and then

he said that he was just tired of it. He'd had enough. I was coming off the scoop.

Q. Did he explain any further, as to why Mr. Aloia had made this statement at this time?

A. Yes, he said that-- he told me that I had called the hotline on his, his scoop car-- his scoop car.

(Tr. 30).

After Lipinski told Shreve about the conversation he had with Aloia, Shreve confronted Aloia. Shreve's testimony concerning that conversation is as follows:

Q. * * * I asked was the statement that was alleged to have been made by Mr. Aloiai [sic] made directly to you?

A. [Shreve] Later that day, yes.

Q. Later what day?

A. The --

Q. The 12th of November?

A. Yes, 12th of November.

Q. And what did Mr. Aloiai [sic] say to you?

A. He said that he blew it.

Q. He blew it?

A. Yeah, he lost it. It was a -- he admitted to everything Ricky said.

* * * * *

Q. All right, at that point what happened?

A. I told him that I was going to file a safety grievance.

Q. You didn't say, what is going on, you said I'm going to file a safety grievance?

A. He knowed what was going on.

Q. How did he know what was going on? I thought you had said you had been in Mr. Donley's office, Mr. Donley

said to go downstairs and go inside and talk to your section foreman?

A. Because I had talked to John-- I had approached John Tothe and John Tothe wanted to meet with me and Albert, and that would have been with no one else there, basically, and that would have been if we would have went in the office, I would have asked for a committeeman and I wouldn't have cared, just so I had somebody to hear the conversation. Now, that's my opinion that he sent "Preacher" away.

Q. All right, what I'm really interested in, Mr. Shreve, what was said between you and Mr. Aloia?

A. That I was going to file a safety grievance.

Q. Over?

A. The way he had been treating me and harassing me. I considered it harassment and discrimination.

Q. Did Albert ask you what sort of harassing treatment you had been subjected to by him?

A. Yes.

Q. What did you say?

A. And I didn't quote the dates or anything, I quoted [sic] over in tailgate. I quoted [sic] up at the end of the section.

Q. You gave him a litany of everything that happened over the years.

A. Yes.

Q. Did you mention the statement by Richard Lipinski?

A. Yes.

Q. And what did Albert say?

A. Albert said, yes he made it. He was just mad because he--

Q. What was the statement that was made by Lipinski quote it exactly, tell me what Albert admitted to, that you recall?

A. I don't follow you, could you repeat the question?

Q. Yes, my question really is, you said that Albert admitted making the statement, I want to know what statement that Albert admitted to making?

A. Albert said that he thought that I'd called the hotline. He-- his scoop, his scoop was turned into the hotline and that-- his exact words were that pissed me off. That's what he said to me.

Q. Albert admitted to you that he thought that you had made the hotline call?

A. Yes.

Q. And that he was upset over it?

A. Yes.

Q. Did he admit that he had threatened to fire you or take you off the scoop car?

A. Yes.

Q. What did he say?

A. He said that he had made the statement, yes, I told Rick that I was going to take you off the scoop car.

Q. Okay, he admitted that, is that your testimony?

A. Yes.

Q. Did he say why he had made that statement allegedly to Mr. Lipinski?

A. I don't-- did he say-- repeat the question.

Q. That question is if Mr. Aloia admitted, as you say that he did, that he'd threatened to take you off the scoop car, did he tell you why or did Mr. Lipinski tell you why Mr. Aloia supposedly made that statement?

A. The first time I heard it was from Rick Lipinski. The second time was in D section with Albert Aloia.

Q. And what was the reason given?

A. Because he was turned into the hotline. His scoop was turned into the hotline.

(Tr. 91 and 100-103).

The same conversation was described by Aloia in the following testimony:

Q. You did talk with Mr. Shreve?

A. Yes.

Q. Did he approach you or did you approach him?

A. He approached John Paul Tothe and said that he needed to talk to us.

Q. That he needed to talk to you and Mr. Tothe?

A. Yes, sir.

Q. Did he say why he needed to talk to you and Mr. Tothe?

A. I don't believe he did, because I really didn't talk to him. He talked to John and John just informed him [sic] that we needed to go over and talk to Mr. Shreve about something.

Q. Okay--

A. And I was supposed to meet John there at twelve o'clock that day or something like that and John filled me in then.

Q. Okay, did you eventually have your discussion with Mr. Shreve and Mr. Tothe?

A. We got there around twelve, and somehow he said he didn't want to talk to John, but John said you had better go over there and talk to him.

Q. John said to you you had better go over there and talk to Gary Shreve?

A. Yes.

Q. Okay, did you go over and talk to him?

A. Yes, I did.

Q. What was the conversation about?

A. We talked about, what Lipinski and I talked about, and we went over some things about how safety problems with the scoop, why they were not reporting and stuff like that, how they got around me, and how they went to the committee

before they came to us, we talked about some other things that had happened on the scoop, with the pitch point signs [sic] and things like that, and I think he said something about I threatened his job, and I stated that I did not threaten his job.

Q. Mr. Shreve asked you whether or not you threatened his job?

A. Yes, he did.

Q. And what did you tell Mr. Shreve?

A. I told him that I did not threaten his job.

Q. Did he ask you whether or not you had threatened to take him off the job of scoop car operator?

A. Yes, I believe that's how it was worded.

Q. Excuse me?

A. I believe that's how it was worded.

Q. What was your response?

A. I said I did not threaten to take him off the job.

Q. Did you ever intend at any time to threaten or take Gary Shreve off the job of scoop car operator?

A. No, I didn't.

Q. Do you feel that anything that you said to Mr. Shreve concerning his work as a scoop car operator, was in any way threatening or intimidating?

A. No, I didn't, I tried to relate to him that when he had safety problems to come to me first, instead of --

Q. Why was that?

A. Because I felt that we had a relationship that we could have solved problems, we didn't have to go outside our group of people.

Q. When you say your group of people, you mean the people that work at the section?

A. Yeah, the twenty-one people that we have.

Q. But you didn't in any way tell Mr. Shreve not to go outside the group of people?

A. No, I didn't, something was stated about, if he was to file a grievance, and I told him that was his right.

Q. So you didn't say you shouldn't file a grievance over this?

A. No, I didn't.

(Tr. 310-313).

Evaluation of the Evidence

In order to prevail in this case, the Complainant must first establish by a preponderance of the evidence that (1) Gary Shreve engaged in a protected activity, (2) that adverse action was taken against him, and (3) that the adverse action was motivated in any part by the protected activity. Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980); rev'd on other grounds, No. 80-2600 (3d Cir. October 30, 1981), Robinnette v. United Castle Coal Co., 3 FMSHRC 803 (1981), and Chacon v. Phelps Dodge Corporation, 3 FMSHRC ____, November 13, 1981. The reporting of an alleged danger or safety violation to the representative of miners is a protected activity under section 105(c)(1) of the Act. Footnote 1/, supra. The miner is protected from retaliation even if he did not actually report a safety violation or hazard to the representative of miners if the adverse action against him was the result of a belief that he had made such a report. Elias Moses v. Whitely Development Corporation, 3 FMSHRC 746 (1981), petition for review granted, May 1981. Even assuming, however, that Shreve had engaged in such a protected activity, I do not find in this case sufficient evidence of resulting discriminatory action or interference to support a violation of section 105(c)(1).

November 10, 1980, Conversation: The complaint alleges that Shreve was unlawfully threatened in a conversation between Aloia and Lipinski on this date. According to Aloia, he told Lipinski in the subject conversation only that "it seemed like we've had a numerous number of problems with that scoop and maybe Gary [Shreve] couldn't handle the job because of all the problems." According to Lipinski, Aloia said:

I'm going to have Gary Shreve taken off the scoop car
* * * everytime he runs it, there's something wrong with the
scoop car. * * * I've tried to work with Gary on getting things
fixed on the scoop car, but it's always one thing after another
and * * * it seems like all the time there's something that
needs fixed [sic] on the scoop.

While Aloia's version of his own statement is too imprecise, ambiguous and conditional to constitute any impermissible threat, I do not find his version to be entirely credible. Because of Lipinski's position of neutrality and

disinterest on the other hand, I find him to be a more reliable witness. It is apparent from Lipinski's version of the conversation that Aloia indeed wanted to have Shreve transferred from the scoop car. According to Lipinski, Aloia was "really upset" and "kind of disgusted" at the time of this conversation because the MSHA hotline had been called on the scoop. Aloia himself admitted that he was indeed "disgusted" to learn that the "hotline" had been called on the scoop because the battery lids on the scoop had already been repaired. While he knew that Shreve had not made the actual "hotline" call, he suspected that Shreve had originated the complaint to the union representative who made that call. Accordingly, I am compelled to find that Aloia's statement to Lipinski was motivated at least in part by his belief that Shreve had originated that safety complaint.

An essential question still remains, however, as to whether that statement of intent to have Shreve transferred even though motivated by a protected activity, resulted in any unlawful interference or discrimination against Shreve if it was expressed only in confidence to a third party with no intent that it be communicated to Shreve. Indeed on the facts of this case, I find that Aloia did not intend to have any part of the conversation disclosed to Shreve. In explaining this confidentiality and his reason for confiding in Lipinski, Aloia testified "[y]ou got to understand that [Lipinski] and I had a fairly good relationship, I felt, we understood each other." Since any reference to the possibility of Shreve being transferred was thus made to Lipinski in confidence with no intent or expectation that Lipinski would violate that confidence, I cannot conclude that any such statement constituted an improper threat to Shreve. The facts are not unlike those in NLRB v. McCann Steel Company, Inc., 448 F.2d 277 (6th Cir. 1971). In that case, an apparent threat made in a private conversation between management personnel not intended to be overheard by any employees was held not to constitute an improper threat to the employees under the National Labor Relations Act. Here, the private conversation between Aloia and Lipinski was not only not intended to be revealed to Shreve, it was deemed by Aloia to be confidential.

It is arguable that Aloia should nevertheless be responsible for threats made out of the presence of Shreve when the third party in whose presence the threats were made violates such a confidence. However, because of the inherent unreliability of such hearsay, Shreve would not be justified in relying on such evidence alone to establish an unlawful threat. Otherwise, an operator could be penalized under the Act for the rankest of irresponsible and false rumors. ^{4/} Before any person under similar circumstances could be permitted to rely upon that type of information, it would be reasonable to expect that it be confirmed, preferably by confronting the source. As

^{4/} This is not to say that where the comments of management personnel are introduced as evidence of motive for a subsequent discriminatory action, such a limitation would apply. In this case, as in McCann Steel, supra, it is the statement itself which is alleged to constitute improper or illegal conduct.

discussed, infra, Shreve did in fact subsequently confront that source, i.e., Aloia, who thereupon apparently confirmed that the earlier conversation between he and Lipinski did in fact take place but indicated that what had been said had since been countermanded and retracted. See discussion of November 12 conversation, infra. Any threat that had been made was accordingly then neutralized. See N.L.R.B. v. Staub Cleaners, Inc., 418 F.3d 1086 (2d Cir. 1969), for application of the "neutralization theory" under the National Labor Relations Act. Under the circumstances, I do not find that either version of the conversation between Aloia and Lipinski on November 10, 1980, would have resulted in any unlawful discrimination or interference.

November 12, 1980, Conversation: It is undisputed that on November 12, 1980, there was a direct conversation between Shreve and Aloia in which Shreve confronted Aloia with the hearsay reports from Lipinski. Even if Shreve's version of this confrontation is accepted as the more credible, it is clear that Aloia did not then threaten to remove Shreve from the scoop car. The most that can be gleaned from Shreve's version of this conversation is that Aloia admitted that in his previous conversation with Lipinski 2 days before, he had indeed threatened to remove Shreve but that he now recognized that such a threat was improper and retracted it. Indeed, by admitting to Shreve that he "blew it," Aloia was clearly expressing that recognition. Thus, when Shreve first confronted Aloia with the hearsay allegations of threats reported to him by Lipinski, the "threats" were neutralized. Staub Cleaners, supra. In other words, as a result of the confrontation on November 12, 1980, Shreve could not have been truly threatened. While he then learned that the previous hearsay rumor about a possible recommended job transfer was in fact accurate, he also learned at the same time that the earlier contemplated action had already been countermanded and was retracted. Under the circumstances, I find that Complainant has failed to meet its burden of proving any unlawful discrimination or interference. 5/ The complaint is accordingly dismissed.



Gary Melick
Administrative Law Judge

5/ Since the prior alleged acts of discrimination against Shreve were admitted only as evidence to support the alleged unlawful nature of the acts of November 10 and 12, which I have found not to be in violation of the Act, a detailed analysis of these incidents is unnecessary. The overall credibility of the complaint herein may also be considered in light of Shreve's allegations that although he had been threatened with discharge or transfer on as many as eight different occasions between December 7, 1979, and March 7, 1981, no such action has ever been taken. Moreover, the Complainant has conceded that the alleged acts of discrimination or interference were each so inconsequential as not to have warranted any remedial action under the Act.

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